Case No. 15,286.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

October Term, 1892

Term No. 1316.

F. O. VINCENT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Filed March 30, 1893.

SUPREME COURT OF THE UNITED STATES.

Term, 189 .

F. O. VINCENT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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SACRAMENTO: : : STATE PRINTING OFFICE, 1893.

In the Superior Court in and for the County of Fresno, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA *against* F. O. VINCENT.	Information for Murder.

F. O. Vincent is accused by the District Attorney for the County of Fresno, State of California, by this information, of the crime of murder, committed as follows:

The said F. O. Vincent, on or about the 18th day of December, eighteen hundred and ninety, at and in the said county of Fresno, and State of California, and prior to the filing of this information, did willfully, unlawfully, feloniously, and with malice aforethought, shoot, kill, and murder Anna L. Vincent, a human being, contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the State of California.

W. D. TUPPER,
District Attorney of the County of Fresno, State of California.

[Indorsed:] No. 651. The People of the State of California *vs.* F. O. Vincent. Information for murder. Filed in the Superior Court of the County of Fresno, State of California, by the District Attorney of said county, this 31st day of December, 1890. A. C. Williams, Clerk. By W. S. Badger, Deputy Clerk. W. D. Tupper, District Attorney.

Arraignment and Time to Plead.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., January 7, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; George Moore, Deputy Sheriff; L. R. Williams, Deputy Clerk.

THE PEOPLE, ETC., *vs.* F. O. VINCENT.	Arraignment and Time to Plead.

The District Attorney, with the defendant and his counsel, S. R. Hart, came into Court for the purpose of arraignment, and the Information is read to the defendant charging him with the crime of murder, and a true copy thereof delivered to him by the Clerk. Defendant states that the name by which he is charged is his true name; and being asked whether he is guilty or not guilty, asks, and is given, till Saturday, the 10th inst., at 10 o'clock A. M. of said day, in which to plead to said Information.

Plea.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., January 10, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk.

THE PEOPLE, ETC., *vs.* F. O. VINCENT.	Plea.

And now at this day comes the defendant and his counsel, S. R. Hart, and the District Attorney being present in Court, and this being the day and hour heretofore fixed for defendant to plead to the Information filed against him, who, being asked to state his plea, orally pleads "Not Guilty," of the offense charged in said Information.

Statutory Time Waived, and Trial Set.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., February 5, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE, ETC., *vs.* F. O. VINCENT.	Statutory Time Waived, and Trial Set.

Now comes the defendant by his counsel, S. R. Hart, and waives the statutory time of trial herein, and it is ordered that the time of the trial in this case be, and the same is hereby fixed, for Monday, the 2d day of March, 1891, at 10 o'clock A. M.

Minutes of the Court.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 11, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; E. M. McArdle, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA *against* F. O. VINCENT.	Trial of Cause, First Day.

This cause came on regularly for trial upon an Information filed herein, charging the defendant with the crime of murder.

W. D. Tupper, District Attorney, and F. H. Short, associate counsel, appear on the part of the People, and S. R. Hart for the defendant, the defendant being present in Court. All parties announce that they are ready to proceed with the trial of the cause.

Proceedings were regularly had to empanel a jury, pending which the regular venire became exhausted, and the Court ordered that a special venire issue herein for seventy-five good and lawful citizens to serve as jurors in this action, and that they be summoned to be and appear in this Court on Friday, the 13th inst., at 9 o'clock A. M.

And it is ordered that an adjournment of the case be had till said last named day and hour.

In the Superior Court of the County of Fresno, State of California.

FRESNO, March 13, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
F. O. VINCENT.
} Trial of Cause, Second Day.

The trial of this cause is resumed, pursuant to adjournment had herein on Wednesday.

W. D. Tupper, District Attorney, and H. H. Welsh and F. H. Short, associate counsel for the People, with the defendant and his counsel, S. R. Hart, are present in Court.

On motion of S. R. Hart, Henry Hogan, Esq., is entered as associate counsel for the defendant herein.

The Sheriff having returned the special venire of jurors issued herein on Wednesday, the names of whom appear regularly entered in the jury book of this Court, to which reference is hereby made.

The defendant, by his counsel, interposes a challenge to the entire panel of jurors summoned upon said special venire, upon the ground of the bias and prejudice of one of the officers who summoned said jurors. Said motion is resisted by the District Attorney, and J. C. Collyer, Under Sheriff, is sworn, and testifies in this behalf, and said matter is submitted to the Court, and the Court, after duly considering thereof, orders that said challenge be, and the same is hereby allowed, and said special venire of jurors is discharged.

Defendant now, by his counsel, interposes a challenge to the regular venire of jurors in attendance herein, upon the ground that said venire of jurors was not drawn as prescribed by Section 205 of the Code of Civil Procedure of the State of California. The District Attorney announces that, without admitting the facts alleged, he will not resist said challenge, and said matter is submitted without argument; and the Court, after duly considering thereof, allows said challenge, and the remainder of said regular venire in attendance at this time are excused from further attendance upon the trial of this cause, and the Court orders that another special venire issue herein for 100 good and lawful citizens to serve as jurors in this action, and that they be summoned to be and appear in this Court on Saturday, the 14th inst., at 10 o'clock A. M. of said day.

And it is ordered that an adjournment of the case be had till said last named day and hour.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 14, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
F. O. VINCENT.
} Trial of Cause, Third Day.

The trial of this cause is resumed, pursuant to adjournment had herein on yesterday.

W. D. Tupper, District Attorney, and F. H. Short and H. H. Welsh, associate counsel for the People, with the defendant and his counsel, S. R. Hart and Henry Hogan, are present in Court.

The Sheriff having returned the second special venire of jurors issued herein on yesterday, consisting of the following-named persons, to wit:

A. W. Calkins, T. J. Pritchard, L. D. Cook, Byron Van Valkenburg, John Garmen, Peter Skivington, J. C. Holly, Milton Brayman, W. M. Story, C. J. Smith, A. Dilley, T. W. Ray, J. E. Pollard, J. J. Elwell, E. T. Woolfolk, J. W. Wilkins, E. M. Russell, A. D. Jones, H. E. Nudd, W. Buchanan, W. F. Plate, M. B. Garney, W. S. Hopkins, A. A. Hoffman, Chas. Erickson, L. L. Boone, M. Martin, R. M. Crow, W. C. Hagan, D. Dismukes, L. P. Clark, T. B. Sneden, T. D. Reed, H. Larsen, T. W. Fresh, S. B. Holton, Chas. Moore, W. N. Lee, W. H. Schrop, C. G. Anderson, D. H. Babby, W. P. Maze, J. L. Wynn, W. J. Miller, L. A. Carson, David Qualls, Frank Trangaza, E. E. Lott, E. Stack, J. F. Hill, C. C. Baer, A. F. Dickey, Frank Lawton, J. P. Wekleman, W. B. Hazelton, W. E. Farwood, W. R. Wood, F. R. Lindsey, A. Vandement, M. L. Dean, Amos Young, Milton Day, Charley Hopper, J. S. Filloon, H. P. Holmes, M. Groth, N. P. Hansen, A. Adelsback, Jens Hansen, L. Seeberg, A. Eastabrook, C. S. Paulsen, W. B. Wilson, S. M. Woft, H. Madsen, Edward Arbaugh, M. M. Parsons, George Cowser, August Young, Frank Manderville, J. Sunmer, John Cobby, Marshall Lee, Thomas Musick, W. W. Machen, F. Berry, C. Henry, A. Ward, Alex. Barringer, Bob Staley, C. J. Berry, C. R. Woods, T. E. Ball, D. Bruce, Fred. Burleigh, H. S. Williams, Willard McGuire, Geo. Smith, J. V. Curd, and Joe Wilkison.

The defendant by his counsel interposes a challenge to the entire panel of jurors summoned upon said second special venire herein, upon the ground that a part of said panel is composed of veniremen who were upon the first special venire herein, and who were on yesterday excused upon the ground that they were summoned by a biased officer. Said challenge is resisted by the District Attorney, and after hearing evidence and arguments of counsel, said matter is submitted to the Court for decision, and after duly considering thereof, and being fully advised in the premises, the Court denies said challenge and orders that the trial of the cause proceed. To which ruling of the Court defendant by his counsel excepts.

Proceedings are resumed to empanel a jury, and the jury box is filled, at which time the defendant by his counsel interposes a challenge to the panel, upon the ground that the ballots containing the names of the jurors were not prepared by the clerk in the presence of the Court. Said challenge is resisted by the District Attorney, and W. S. Badger, a deputy clerk, is sworn and testifies in this behalf, and the matter is submitted without argument, and the Court, after duly considering thereof, and being fully advised in the premises, denies said challenge, and orders that the trial proceed, to which ruling of the Court defendant by his counsel excepts, and the proceedings to empanel a jury are resumed, pending which the Court ordered an adjournment of the case till 2 o'clock P. M. of this day.

The Court reconvened at 2 P. M., when counsel for the People, with the defendant and his counsel, are present in Court.

Proceedings were resumed to empanel a jury, pending which the Court ordered an adjournment of the case till Monday, the 16th inst., at 10 o'clock A. M. of said day.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 16, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
F. O. VINCENT.
} Trial of Cause, Fourth Day.

The trial of this cause is resumed pursuant to adjournment had herein on Saturday.

W. D. Tupper, District Attorney, and F. H. Short, associate counsel for the People, with the defendant and his counsel, S. R. Hart and Henry Hogan, are present in Court.

Proceedings were resumed to empanel a jury, pending which the Court ordered an adjournment of the case till 2 o'clock P. M. of this day.

The Court reconvened at 2 P. M., when counsel for the People, with the defendant and his counsel, are present in Court.

Proceedings to empanel a jury are resumed, pending which the Court ordered an adjournment of the case till to-morrow, the 17th inst., at 9 o'clock A. M.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 17, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
F. O. VINCENT.
} Trial of Cause, Fifth Day.

The trial of this cause is resumed pursuant to adjournment had herein on yesterday.

W. D. Tupper, District Attorney, and F. H. Short and H. H. Welsh, associate counsel for the People, with the defendant and his counsel, S. R. Hart and Henry Hogan, are present in Court.

The defendant, by his counsel, moves the Court for a change of place of trial to another Court of the State of California, in and for some other county of said State, other than the county of Fresno, upon the grounds that the defendant herein cannot have a fair and impartial trial within this the county of Fresno. The affidavits of said defendant, F. O. Vincent, and of S. R. Hart and Henry Hogan are introduced and read in support of said motion, which is resisted by counsel for the People, and F. H. Short is sworn and testifies in this behalf, and after argument said motion is submitted to the Court for decision, and after duly considering thereof and being fully advised in the premises, the Court denies said motion and orders that the trial of the case proceed, to which ruling of the Court, defendant, by his counsel, excepts.

Proceedings were resumed to empanel a jury, and H. P. Holmes, J. J. Elwell, A. D. Jones, H. L. Nudd, E. M. Russell, and W. Buchanan having been examined on their *voir dire* and accepted by the respective parties, are sworn to try the cause, and the Court orders an adjournment of the case till 2 o'clock P. M. of this day; and the jurors accepted and sworn to try the cause are placed in charge of Deputy Sheriff George Moore, who is duly sworn according to law.

The Court reconvened at 2 o'clock P. M., when counsel for the People, with the defendant and his counsel, are present in Court, and the jurors accepted and sworn are in their seats.

Proceedings to empanel a jury are resumed, and John Cobby, W. W. Machen, J. E. Pollard, and Byron Van Valkenburg, having been examined on their *voir dire* and accepted by the respective parties, are sworn to try the cause, and the venire is exhausted, and the Court orders that another special venire issue herein for forty good and lawful citizens to serve as jurors in this action, and that they be summoned to be and appear in this Court on to-morrow, the 18th instant, at 2 o'clock P. M.

On application of counsel for the defendant, it is ordered that the reporter transcribe his shorthand notes of the testimony of the jurors accepted and sworn to try the cause.

And the Court orders an adjournment of the case till to-morrow, the 18th instant, at 2 o'clock P. M., and the jurors accepted and sworn to try the cause are placed in charge of Deputy Sheriff Geo. Moore, who is duly sworn according to law.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 18, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA *against* F. O. VINCENT.	Trial of Cause, Sixth Day.

The trial of this cause is resumed pursuant to adjournment had herein on yesterday.

W. D. Tupper, District Attorney, and F. H. Short, associate counsel for the People, with the defendant and his counsel, S. R. Hart and Henry Hogan, are present in Court, and the jurors accepted and sworn are in their seats. The Sheriff having returned the third special venire issued herein on yesterday, consisting of the following-named persons, to wit:

A. Melvin, A. J. Macy, J. F. Coney, A. C. Morton, J. H. Wagoner, M. Dodge, John McGarry, William Britner, S. W. Johnson, E. W. Gould, R. Docekel, Henry Donahoo, Thomas Bradford, M. Russell, Ray White, Jacob Weaver, Charley Easton, W. F. Ensign, C. R. McClahan, C. F. Ellis, J. B. Reybuna, Thomas Ponton, B. Richardson, Charles Clark, P. M. Hart, S. P. Conger, T. W. Cobby, J. M. Rose, W. D. Wristen, William Hamilton, C. C. Puryear, J. C. C. Russell, J. W. Rogers, D. Watson, Charles Mutchlar, James Simmons, C. A. Stevens, S. R. Morrison, H. T. Unger, and W. S. Lane.

The defendant, by his counsel, interposes a challenge to the entire panel of jurors summoned upon said third special venire herein, upon the ground of the bias of the officer who summoned them. Said challenge is resisted by the District Attorney, and is submitted to the Court without argument, and after duly considering thereof, and being duly advised in the premises, the Court denies said challenge, and orders that the trial proceed, to which ruling of the Court the defendant, by his counsel, excepts.

Proceedings to empanel a jury are resumed, and the jury box is filled, at which time defendant, by his counsel, interposes a challenge to the panel, upon the ground that the ballots containing the names of the jurors were not prepared by the Clerk in the presence of the Court. Said challenge is resisted by the District Attorney, and W. S. Badger, a Deputy Clerk, is sworn, and testifies in this behalf, and the matter is submitted without argument, and the Court, after duly considering thereof, and being fully advised in the premises, denies said challenge, and orders that the trial proceed, to which ruling of the Court the defendant, by his counsel, excepts.

The proceedings to empanel a jury are resumed, and John McGarry and Charles Clark having been examined on their *voir dire* and accepted by the respective parties, are sworn to try the cause, and the jury is complete.

And the Court orders an adjournment of the case till to-morrow, the 19th instant, at 9 o'clock A. M. of said day.

And the jury is placed in charge of Deputy Sheriff George Moore, who is duly sworn, according to law.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 19, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
F. O. VINCENT.
} Trial of Cause, Seventh Day.

The trial of this cause is resumed pursuant to adjournment had herein on yesterday.

W. D. Tupper, District Attorney, and F. H. Short, associate counsel for the People, with the defendant and his counsel, S. R. Hart and Henry Hogan, are present in Court, and the jury in their seats.

The Information is read, and the plea of not guilty of the defendant is stated to the jury by the Clerk.

The defendant, by his counsel, objects to proceeding with the trial of this case to any further extent, upon the ground that the panels from which the jury was drawn have been illegally drawn, for the reasons stated in the previous motions made in this Court, which are a part of the record. Said objection is submitted without argument, and by the Court overruled, to which ruling the defendant, by his counsel, excepts.

It is ordered that the reporter transcribe his shorthand notes of the testimony herein, and furnish a copy thereof to each counsel for the People and the defendant.

After a statement of the case by W. D. Tupper, District Attorney, Mrs. H. I. Rogers and Mrs. A. J. Redd are sworn and testify on the part of the People, and the Court orders an adjournment of the case till 1:30 P. M. of this day.

And the jury is placed in charge of Deputy Sheriff Geo. Moore, who is duly sworn, according to law.

The Court reconvened at 1:30 P. M., when counsel for the People, with the defendant and his counsel, are present in Court, and the jury in their seats.

Mrs. A. J. Redd and Mrs. H. I. Rogers are recalled for further cross-examination, and J. E. Ragsdale, D. R. Prince, J. G. Johnston, O. M. Thompson, C. Hershey, F. M. Curran, A. H. Jameson, C. S. Swain, Marion Childers, and Dr. W. T. Maupin are sworn, and testify on the part of the People, and the Court orders an adjournment of the case till to-morrow, the 20th instant, at 9 o'clock A. M.

And the jury is placed in charge of Deputy Sheriff Geo. Moore, who is duly sworn, according to law.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 20, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
F. O. VINCENT.
} Trial of Cause, Eighth Day.

The trial of this cause is resumed pursuant to adjournment had herein on yesterday.

W. D. Tupper, District Attorney, and F. H. Short, associate counsel for the People, with the defendant and his counsel, S. R. Hart and Henry Hogan, are present in Court and the jury in their seats.

The District Attorney announces that the People rest their case, and after a statement of the case to the jury by Henry Hogan, Esq., Dr. H. N. Rucker, Samuel Ralston, John Graupman, Fred. Grimmer, A. Wolters, Henry Wehner, E. T. Houston, Gus. Lamond, and Dr. F. M. Sponogle are sworn, and testify on the part of the defendant, and the Court orders an adjournment of the case till 2 o'clock P. M of this day.

And the jury is placed in charge of Deputy Sheriff Geo. Moore, who is duly sworn according to law.

The Court reconvened at 2 o'clock P. M., when counsel for the People, with the defendant and his counsel, are present in Court and the jury in their seats.

The taking of testimony is resumed, and Nick Justy, J. E. Williams, Robert Brown, A. H. Kuhlman, W. P. Miller, P. B. Chambers, M. Murray, John Morse, Wm. Sparks, Jas. Graham, Wm. Shields, J. A. Barker, Jno. M. Ryan, L. C. Smith, Chas. Swain, W. R. Williams, Henry Roemer, Chas. W. Gearhart, Geo. Moore, Albert Storey, H. Bedford, N. L. F. Bachman, H. O. Buker, Chris. Hartsough, W. A. Bigby, Dr. H. St. George Hopkins, M. A. Blade, Jos. Spinney, and Mrs. Ellen Chapell are sworn. and testify on the part of the defendant, pending which testimony of the last named witness the Court ordered an adjournment of the case till to-morrow, the 21st inst., at 9 o'clock A. M.

And the jury is placed in charge of Deputy Sheriff Geo. Moore, who is duly sworn according to law.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 21, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA *against* F. O. VINCENT.	Trial of Cause, Ninth Day.

The trial of this cause is resumed pursuant to adjournment had herein on yesterday.

W. D. Tupper, District Attorney, and F. H. Short, associate counsel for the People, with the defendant and his counsel, S. R. Hart and Henry Hogan, are present in Court, and the jury in their seats.

John R. Garret is sworn and testifies, and Mrs. Ellen Chapell resumes her testimony, and having concluded, Mrs. J. G. Johnston, F. O. Vincent, the defendant, and L. W. Johnson are sworn, and John Graupman is recalled, and G. B. McIntosh and Dr. C. H. Adair are sworn, and each testify on the part of defendant, and the Court orders an adjournment of the case till 2 o'clock P. M. of this day.

And the jury is placed in charge of Deputy Sheriff Geo. Moore, who is duly sworn according to law.

The Court reconvened at 2 o'clock P. M., when counsel for the People, with the defendant and his counsel, are present in Court, and the jury in their seats.

The defendant, by his counsel, announces that he rests his case, and Henry Smart, John Morse, Geo. Moore, Dr. W. T. Maupin, and Mrs. J. G. Johnston are sworn, and testify in rebuttal on the part of the People, and Dr. C. H. Adair is recalled and testifies on behalf of the defendant, and the testimony is closed.

The cause is argued by F. H. Short on the part of the People, and the Court orders an adjournment of the case till Monday, the 23d instant, at 10 o'clock A. M. of said day.

And the jury is placed in charge of Deputy Sheriff Geo. Moore, who is duly sworn according to law.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 23, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA *against* F. O. VINCENT.	Trial of Cause, Tenth Day.

The trial of this cause is resumed pursuant to adjournment had herein on Saturday.

W. D. Tupper, District Attorney, and F. H. Short, associate counsel for the People, with the defendant and his counsel, S. R. Hart and Henry Hogan, are present in Court and the jury in their seats.

S. R. Hart and Henry Hogan address the jury on behalf of the defendant, pending which argument of the last named counsel the Court orders an adjournment of the case till two o'clock P. M. of this day.

And the jury is placed in charge of Deputy Sheriff Geo. Moore, who is duly sworn according to law.

The Court reconvened at 2 o'clock P. M., when counsel for the People, with the defendant and his counsel are present in Court, and the jury in their seats.

The argument to the jury is resumed by Henry Hogan on behalf of the defendant, who having concluded, is followed by W. D. Tupper on the part of the People, pending which argument of the last named counsel the Court orders an adjournment of the case till to-morrow, the 24th instant, at 9 o'clock A. M., and the jury is placed in charge of Deputy Sheriff Geo. Moore, who is duly sworn, according to law.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 24, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
F. O. VINCENT.
} Trial of Cause, Eleventh Day.

The trial of this cause is resumed pursuant to adjournment had herein on yesterday.

W. D. Tupper, District Attorney, and F. H. Short, associate counsel for the People, with the defendant and his counsel, S. R. Hart and Henry Hogan, are present in Court and the jury in their seats.

W. D. Tupper, District Attorney, resumes his argument to the jury on the part of the People, and having concluded, the cause is submitted to the jury, who being first instructed by the Court in the law governing the case, retire in charge of a sworn officer to deliberate upon their verdict, and subsequently coming into Court, and being called, all answer to their names and through their Foreman say:

"We, the jurors, find the defendant guilty of murder in the first degree.
"W. W. MACHEN, Foreman."

Upon application of counsel for defendant the jury is polled by the Clerk, and each of said jurors severally declared the same to be his verdict, and the jury is discharged from further consideration of the case.

By consent of counsel for the defendant, it is ordered that the time for passing sentence upon the defendant herein be, and the same is hereby fixed for Monday, the 6th day of April, 1891, at 10 o'clock A. M. of said day.

Instructions of the Court.

Allowed—
S. A. Holmes, Judge.

GENTLEMEN OF THE JURY: The defendant, F. O. Vincent, is charged by the information filed in this Court against him with the crime of murder, alleged to have been committed in the County of Fresno, State of California, by willfully, feloniously, unlawfully, and of his malice aforethought having killed and murdered one Anna L. Vincent, a human being, on the 18th day of December, 1890.

Under the information in this case you may find one of four verdicts, as the evidence may warrant:

First—Murder of the first degree; or,

Second—Murder of the second degree; or,
Third—Manslaughter: or,
Fourth—Not guilty.

In the Superior Court in and for the County of Fresno, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
F. O. VINCENT.

Counsel for the defense respectfully asks the following instructions to be given by the Court to the jury:

(1)

Allowed—
S. A. Holmes,
Judge.

Murder is defined by our statutes to be the unlawful killing of a human being, with malice aforethought. Such malice may be expressed or implied.

It is expressed when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

All murder which is perpetrated by means of poison, or lying in wait, torture, or any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder in the first degree, and all other kinds of murder are murder in the second degree.

In order to convict the defendant of murder in the first degree, express malice must be affirmatively proved. Express malice is manifested and proved when it appears by the circumstances preceding and connected with the homicide that the killing was unlawful, willful, deliberate, and premeditated.

(2)

Allowed—
S. A. Holmes, Judge.

The chief difference which distinguishes murder in the first degree from murder in the second degree consists in the presence or absence of a willful, deliberate, and premeditated intent to kill. If you find the defendant committed the homicide, the next question to determine is, was the homicide accompanied by deliberate and clear intent to take life? In order to constitute murder in the first deglee, the intent to kill must be the result of deliberate premeditation. It must be formed upon a preëxisting reflection, and not upon a sudden heat of passion, sufficient to preclude the idea of deliberation.

In murder of the second degree there is no deliberation, premeditation, and preconceived design to kill. In both cases—murder in the first and second degree—the killing must have been unlawful and accompanied with malice.

(3)

In order to constitute murder in the first degree in this case, you must find from the evidence that the killing was—

First—Unlawful, because the killing of a human being is in many cases right and proper in the eyes of the law.

Second—You must find that the killing was done in malice. Malice in its legal sense denotes a wrongful act done intentionally without any just cause or excuse.

*Allowed—
S. A. Holmes, Judge.*

Third—The killing must have been willful.

Fourth—It must have been the result of deliberation.

Fifth—It must have been premeditated. And each one of these elements must be proved by the prosecution beyond a reasonable doubt. The law does not imply deliberation and premeditation. That must be proved by the prosecution affirmatively and beyond a reasonable doubt. And if you find that any one of these elements is wanting in this case, or if you have a reasonable doubt as to the existence of any of these elements from the evidence, I charge you that you cannot find a verdict of murder in the first degree.

(4)

*Allowed—
S. A. Holmes, Judge.*

If you shall come to the conclusion from the evidence that the defendant is not guilty of murder, you will then consider the question of manslaughter. Manslaughter is the unlawful killing of a human being without malice, either expressed or implied. Manslaughter differs from murder in the important particular of the absence of malice in the former.

(4 A)

*Allowed—
S. A. Holmes, Judge.*

If you find, from the evidence, that the accused committed the offense charged, the next question for your consideration is whether, at the time the defendant committed the homicide, he was in a state of mind to be made responsible to the law for the killing.

(5)

*Allowed as added to—
S. A. Holmes, Judge.*

Whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury, if they find from the evidence that intoxication existed, may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.

(6)

The law declares that the intent with which a public offense is committed is manifested by the circumstances connected therewith, and the sound mind and discretion of the accused.

*Allowed—
S. A. Holmes, Judge.*

Insanity means such a diseased and deranged condition of the mental faculties as to render the person incapable of distinguishing between right and wrong at the time, and in relation to the act with which he is charged. All men have not the same mental force and characteristics, nor is the same man at all times in the same condition as to mental powers or physical strength. His faculties may be impaired by excesses, and by causes calculated to disturb and influence his passions.

(7)

Allowed—S. A. Holmes, Judge.

In order to constitute crime, a man must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental powers; or, if through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

If, therefore, the jury finds from the evidence that the defendant had a mental disease, whether induced by the excessive use of intoxicating drinks, bodily injury, or inherited, or from whatever cause, and that at the time of the homicide that disease was present in the defendant, and acting upon him with such force and effects that for the time being it obliterated his intellectual powers to the extent that he could not determine the purpose, motive, or intent with which he committed the act, you must find him not guilty.

(8)

Allowed—
S. A. Holmes, Judge.

If the jury believe, from the evidence, that at the time of committing the homicide the defendant was laboring under such a defect of reason from disease of the mind, whether that disease was inherited, or induced by strong drink, or from whatever cause, as not to know the nature and quality of the act he was doing, or if he did know it, he did not know what he was doing was wrong, then you must find the defendant not guilty.

(9)

Allowed by striking out
word "only"—
S. A. Holmes, Judge.

In determining the question of insanity the defendant is required to establish that fact by a preponderance of evidence. If, therefore, the jury find that a preponderance of proof shows that defendant, at the time of the commission of the homicide, was insane, they will find him not guilty.

(10)

Allowed—
S. A. Holmes, Judge.

If the jury believe from the evidence that at the time the defendant killed the deceased that he, the defendant, was insane, which insanity was inherited or caused by habitual and long continued intemperate use of intoxicating liquor and ardent spirits or drugs, and that by reason of such insanity so caused he was laboring under such a defect of reason and mind as not to know the nature or quality of the particular act with which he stands charged, or if he did know its nature and quality, that he did not know it was wrong, and you find this by a preponderance of evidence, you will find the defendant not guilty.

(13)

Allowed—
S. A. Holmes,
Judge.

A party charged with crime is not bound to establish his innocence. He is considered innocent until the prosecution establishes the contrary by convincing proof.

(14)

The odious and flagrant character of the crime charged ought not to prejudice you against the defendant without full and sufficient proof that he is guilty, or induce you to convict the defendant upon insufficient and defective proofs.

Allowed—
S. A. Holmes,
Judge.

(14 A)

The jury is instructed that the defendant is charged with the murder of one Anna L. Vincent. I instruct you that it is no more an offense to kill a woman than a man; that in the consideration of this case the fact that the person killed was the defendant's wife is not from that fact alone to weigh in your mind one way or the other in arriving at your verdict.

Allowed—
S. A. Holmes,
Judge.

(15)

This case must not be determined on a mere balance of probabilities, nor must the aggregate probabilities of guilt be considered as sufficiently established while any counter probability or even possibility of innocence is admitted to exist. In short, the jury are to be morally certain of the guilt of the defendant to the exclusion of every reasonable doubt before they can render a verdict of guilty.

Allowed—
S. A. Holmes,
Judge.

(16)

In civil cases the decision must be made according to the preponderance of evidence, but this is not the rule in criminal actions. A defendant cannot be convicted unless his guilt is established by more than a mere preponderance of evidence. It is not enough that the jury should be satisfied of his guilt to such an extent that they would be willing to act upon such belief in the ordinary affairs of life. This will not do. The rule is strict, because it is considered better that any number of guilty persons should escape than to adopt a course under which an innocent man might be convicted because of the erroneous conclusions of a Court or jury. Hence it is that the law requires guilt to be proven beyond a reasonable doubt.

Allowed—
S. A. Holmes, Judge.

(17)

The burden is upon the prosecution, not only to establish the principal facts in the case beyond a reasonable doubt, but every link in the chain of evidence relied upon by the State must be proved beyond a reasonable doubt.

Allowed—
S. A. Holmes,
Judge.

(18)

If, after an impartial consideration of the entire evidence submitted to you, there lingers in your minds a reasonable doubt of the guilt of the accused, you must acquit.

Allowed—
S. A. Holmes,
Judge.

(19)

Allowed—
S. A. Holmes,
Judge.

And where the evidence is equally balanced the decision must be in favor of the defendant, and he is entitled to an acquittal.

(20)

Allowed—
S. A. Holmes,
Judge.

The burden of proving everything essential to the establishment of the crime charged against the defendant, lies on the prosecution.

(21)

Allowed as added to—
S. A. Holmes, Judge.

The burden of proof is upon the prosecution. All the presumptions of law, independent of evidence, are in favor of innocence until the defendant is proved guilty. If, upon the proof, there is a reasonable doubt remaining as to his guilt, the defendant is entitled to the benefit of it by an acquittal, for it is not sufficient to establish the probability, though a strong one, arising from the doctrine of chances, that the facts charged are more likely to be true than the contrary, but the jury must be entirely satisfied of the guilt of the defendant, and unless you are entirely satisfied of his guilt, you must acquit.

(22)

Allowed as added
to—
S. A. Holmes, Judge.

The defendant is presumed to be innocent until his guilt is established by proofs. He is entitled to the benefit of any and all reasonable doubts as to his guilt, and cannot be convicted of any degree of crime unless the jury are convinced from the evidence in the case, beyond all reasonable doubt, that he is guilty of such degree of crime.

(23)

Allowed as added to—
S. A. Holmes,
Judge.

In no case has the jury a right to presume a fact against the defendant, except upon evidence offered and received by the Court; on the contrary, you are to presume his innocence until his guilt is proved beyond a reasonable doubt, and you should weigh every fact and circumstance, and see if it can be reconciled with innocence, and if you can so reconcile it, or if, after so weighing the evidence, there is a reasonable doubt of the defendant's guilt, it would be your duty to acquit him.

(24)

Allowed—
S. A. Holmes,
Judge.

If any one of the jury, after having considered all the evidence in this case, and after having consulted with his fellow-jurors, should entertain a reasonable doubt of the defendant's guilt, then such juror cannot, while he entertains such doubt, consistently with his oath as a juror, agree to a verdict finding the defendant guilty.

(25)

Each juror is to act upon his own individual judgment and upon the facts of the case, and if he entertains a reasonable doubt of the defendant's guilt he is not required to surrender his own conviction and render a verdict of guilty merely because the other jurors entertain no such doubt.

Allowed—
S. A. Holmes, Judge.

(26)

The jury should bear in mind that although every fact and circumstance relied upon by the prosecution in the chain of circumstances is proved to your entire satisfaction, it does not necessarily follow that the defendant is guilty. If the facts so proved can be reconciled upon any reasonable hypothesis, consistent with the defendant's innocence, then you should acquit him. The true rule of law is this: That the facts so proved, in order to justify conviction, must not only be consistent with the defendant's guilt, but must also be wholly inconsistent with any other reasonable hypothesis.

Allowed—
S. A. Holmes, Judge.

(27)

The evidence in this case, to warrant you in finding the defendant guilty, must be entirely consistent with the theory of the defendant's guilt, and inconsistent with every other reasonable theory. And I instruct you that it is your duty to try to reconcile the evidence herein with such theory of the defendant's innocence. And it is not sufficient that the evidence herein is consistent with the theory of the defendant's guilt, or makes it probable that the defendant is guilty of the offense charged. But you must be entirely satisfied that the evidence is entirely inconsistent with the theory of the innocence of defendant, and entirely and solely consistent with the theory of the guilt of the defendant, before you can find defendant guilty.

Allowed—
S. A. Holmes, Judge.

(28)

It is not sufficient that you should entertain a suspicion, no matter how strong that suspicion may be, of the guilt of this defendant from the evidence presented in this case.

This will not warrant you in finding this defendant guilty, but you must be entirely satisfied to a moral certainty and beyond a reasonable doubt that if the offense charged was committed, that this defendant committed the offense charged, and was sane at the time of its commission, and unless you are so satisfied, then you should acquit the defendant.

Allowed—
S. A. Holmes, Judge.

(29)

The Court instructs the jury that the law deems it better that many guilty persons should escape rather than one innocent person should be convicted and punished; so that unless, after careful consideration of all the evidence and circumstances in the case, you can say and feel that every material allegation in the information necessary to constitute the offense charged, or any lesser offense included therein, is proved beyond a reasonable doubt, your verdict must be not guilty.

Allowed—
S. A. Holmes, Judge.

(30)

I instruct you that laws are made and juries called to investigate cases just as much for the protection of the innocent as for the punishment of the guilty. If, therefore, after a careful consideration of all the evidence, you believe that the defendant is not guilty, you must say so by your verdict, and by so doing the object of the law will be as fully attained as if you were to find a verdict of guilty.

Allowed— S. A. Holmes, Judge.

(31)

I further instruct you that if from the evidence in this case you are satisfied beyond a reasonable doubt that the defendant, under the law, is guilty of murder in the first degree, or that he is guilty of murder as charged in the information, and you return a verdict that the defendant is guilty of murder in the first degree, or that your verdict is that he is guilty of murder as charged in the information, then this Court must sentence this defendant to a death by hanging, and this Court will have no discretion in passing the sentence.

Allowed— S. A. Holmes, Judge.

The law of this State is that any person found guilty of murder in the first degree shall suffer death or confinement in the State Prison for life, at the discretion of the jury trying him. I instruct you that if you find the defendant guilty of murder in the first degree you have the power and the right alone to fix the penalty he shall suffer; that is, either death or imprisonment for life, and with you alone rests the question, if you find the defendant guilty of murder in the first degree, as to whether he shall suffer death or imprisonment in the State Prison for life.

[Indorsed:] 651. Superior Court of State of California, County of Fresno. The People *vs.* F. O. Vincent. Instructions offered by the defendant, thirty-one in number. Filed 24th March, 1891. A. C. Williams, Clerk. By W. S. Badger, Deputy.

In this case it is not claimed by the prosecution that the homicide charged was committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or mayhem, but it is claimed that it is murder in the first degree as being unlawful, malicious, willful, deliberate, and premeditated. In this class of cases, the Legislature leaves the jury to determine from the evidence before them the degree of the crime, but prescribes for the government of their deliberation the same test, which is: Is the killing willful, deliberate, and premeditated? The unlawful killing must be accompanied with a deliberate and clear intent to take life in order to constitute murder of the first degree. The intent to kill must be the result of deliberate premeditation. It must be formed upon a preëxisting reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation. There need be no appreciable time between the intent to kill and the act of killing. They may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded

Allowed—S. A. Holmes, Judge.

by a concurrence of will, deliberation, and premeditation on the part of the slayer, and if such is the case the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing.

From these definitions the jury will see that any unlawful killing of a human being with malice aforethought is murder, but if nothing further characterizes the offense it is murder of the second degree. To constitute the higher offense there must be superadded to the general definition above given willfulness, deliberation, and premeditation. By willfulness is meant that it was of purpose, with the intent that by the given act the life of the party should be taken.

Allowed— S. A. Holmes, Judge.

It must be deliberate and premeditated. By this it is not meant that the killing must have been conceived or intended for any particular length of time. It is sufficient if it was done on reflection and conceived beforehand; and in this view, as I have said before, the deliberate purpose to kill and the killing may follow each other as rapidly as successive impulses or thoughts of the mind. It is enough that the party deliberate before the act, premeditate the purpose to slay before he gave the fatal blow. But while the purpose, the intent, and its execution may follow thus rapidly upon each other, it is proper for the jury to take into consideration the shortness of such interval, if it were short, in considering whether such sudden and speedy execution may not be attributed to sudden passion and anger rather than to deliberation and premeditation, which must characterize the higher offense.

Allowed— S. A. Holmes, Judge.

From what I have said you will see that the distinction between the two grades of offense is that in murder of the first degree, unless it was committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, the killing must be deliberate and premeditated. In the one case there is a deliberate and premeditated, preconceived design, though it may have been formed on the mind immediately before the mortal wound was given, to take life. In the other case there is no deliberation, premeditation, or preconceived design to kill. In both, however, the killing must have been unlawful and accompanied with malice.

Allowed— S. A. Holmes, Judge.

In every crime or public offense, gentlemen of the jury, there must exist a union or joint operation of act and intent or criminal negligence.

Allowed— S. A. Holmes, Judge.

Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

Allowed— S. A. Holmes, Judge.

In this case, if you find from the evidence that the defendant fired the fatal shot, then the burden of proving circumstances of mitigation or that justify or excuse the homicide devolves upon the defendant, unless the proof upon the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

Allowed— S. A. Holmes, Judge.

The law presumes every man to be innocent until his guilt is established beyond any reasonable doubt, and this presumption attaches at every stage of the case and to every fact essential to a conviction. But by a reasonable doubt is not meant every possible or fanciful conjecture that may be suggested. Everything relating to human affairs and depending upon moral evidence is open to some fanciful doubt or conjecture. By a reasonable doubt is meant that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge.

Allowed— S. A. Holmes, Judge.

In every public offense there must exist a union or joint operation of act and intent, or criminal negligence.

The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused; and I further instruct you that all persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity to such an extent as to be unable to discern right from wrong.

A malicious and guilty intent is always presumed from the deliberate commission of an unlawful act, for the purpose of injuring another.

Allowed— S. A. Holmes, Judge.

Section 26 of the Penal Code of this State provides that all persons are capable of committing crimes except those belonging to certain classes, among which are idiots, lunatics, and insane persons, and persons who committed the act charged without being conscious thereof. This section is intended to include all persons who are not of sound mind from any cause.

When considered in relation to crime, it is a general rule that persons who are in that condition which the law recognizes as of unsound mind or insane, are not responsible criminally for their acts when in that condition. But it is also true that mere weakness of mind alone, or slight mental ailments which do not exclude the knowledge of right and wrong, and the power to act in accordance with the plain dictates of reason and justice, does not constitute unsoundness of mind or insanity in law.

Allowed— S. A. Holmes, Judge.

The true test of criminal responsibility, where the defense of insanity is interposed, is whether the accused had, at the time he killed the deceased, sufficient use of his reason to understand the nature of the act he was committing, and to understand that it was wrong and contrary to law for him to commit it. If this was the fact, he is criminally responsible for it, whatever peculiarities be shown about him in other respects; whereas, if his reason was so defective in consequence of mental disorder, generally supposed to be caused by brain disease, that he could not understand what he was doing, or that what he was doing was wrong, he should be treated as an irresponsible person. In other words, did he at the time know that he was killing a human being, and that such killing was wrong and contrary to law? If so, he was responsible for his acts.

Allowed—
S. A. Holmes, Judge.

In prosecutions for crimes the defense of insanity is often interposed, and has become a subject of paramount importance in criminal jurisprudence. A due regard for the ends of justice and the peace and welfare of society, no less than mercy for the accused, require that such a defense should be thoroughly and carefully weighed. And although it is a defense which you may feel is sometimes wrongfully resorted to, especially in cases where aggravated crimes have been committed, under circumstances which afford full proof of the overt act, and render hopeless all other means of evading punishment, you should receive it as a no less full and complete than it is a human defense, when it has been satisfactorily established by a preponderance of the evidence. And yet a defense of insanity should be examined into by the jury with great care, lest an ingenious counterfeit of the malady furnished protection to guilt.

Allowed—
S. A. Holmes, Judge.

A person is presumed to be sane until the contrary is shown. Sanity is presumed to be the normal state or condition of the human mind, and, therefore, it is not incumbent upon the prosecution in proving the case to give affirmative evidence that the defendant was sane at the time of the alleged homicide.

Allowed—
S. A. Holmes, Judge.

I therefore instruct you that the burden of proving that the defendant was insane at the time of the alleged homicide is upon him, and the presumption that he was sane, in his right mind, able to discern right from wrong, must prevail, until he shows by a preponderance that such presumption is false. In this connection I instruct you that the preponderance of evidence here mentioned does not depend on the number of witnesses testifying to the fact of insanity or the circumstances relied upon to show it.

Allowed—
S. A. Holmes, Judge.

You are not bound to decide the question of insanity in this case in conformity with the declarations of any number of witnesses, which do not produce conviction in your minds, against a less number, or against a presumption or other evidence satisfying your mind. You should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify, their acquaintance with and knowledge of the defendant, and their opportunities of judging of his mental condition; their conduct and demeanor while giving their testimony, their interest or lack of interest in having the insanity of the defendant established; the probability or the improbability of their several statements, in view of all the other evidence, facts, and circumstances proved at the trial, if any; and from all these circumstances, you should determine upon which side is the weight or preponderance of the evidence on the question of insanity.

Allowed—
S. A. Holmes, Judge.

I charge you that if you believe from the evidence, beyond a reasonable doubt, that the defendant did kill the deceased as charged, and you should then find that there is a preponderance of evidence in favor of the defense of insanity, and by which you determine that the defendant was insane at the time of the alleged homicide to such a degree that he did not know that his act was wrong, or that if he did know that it was wrong, he had no power to restrain himself, then you should find him not guilty.

Allowed—
S. A. Holmes, Judge.

I instruct you that if you believe from the evidence, beyond a reasonable doubt, that the defendant did kill the deceased as charged, and you then find by the preponderance of the evidence on the question of insanity, that at the time of the alleged homicide he had capacity and reason sufficient to enable him to distinguish between right and wrong as to this particular homicide, if any; that is, if he had at that time knowledge sufficient and was conscious that he was doing a wrong and would deserve punishment, the law considers him to have been of sound mind and memory, and capable of committing crime, and it is your duty, under your oaths, to find him guilty in the degree you may determine from the evidence and under these instructions.

Allowed—
S. A. Holmes, Judge.

I instruct you that one who, in possession of a sound mind, commits a criminal act under the influence of passion or revenge, which may temporarily dethrone his reason or, for the time being, control his will, cannot be shielded from the consequences of the act by the plea of insanity or irresistible impulse. And therefore if you believe from the evidence beyond a reasonable doubt that the defendant killed the said deceased as charged, without legal justification or excuse, but that at the time of the killing he was of sound mind, but that he was in such a passion of rage towards deceased, or was so filled with a desire to wreak his vengeance upon deceased for some real or fancied injury, that his reason was thereby and for the time being dethroned, and his power to control his will thereby and for the time being gone, he is not to be excused from the consequences of his act, and you must find him guilty.

Allowed—
S. A. Holmes, Judge.

I instruct you that there can be no such thing as an impulse to commit a crime, which is absolutely irresistible, when there is a capacity to distinguish between right and wrong with reference to such acts, if there remains a will sufficient to control the impulse; and there is no impulse which is uncontrollable and which leaves the reasoning powers—including the capacity to appreciate the nature and quality of the particular act—unaffected by mental disease.

In the Courts of California there is no such doctrine recognized as moral insanity distinguished from mental derangement as an excuse for crime and as an exemption from punishment therefor.

Allowed—
S. A. Holmes,
Judge.

There is no such type of insanity recognized in our Courts as, for instance, that a person may steal your property, burn your dwelling, murder, or attempt to murder you, and know at the time that the deed is a criminal act, and wrong in itself, and deserves punishment, having the ability to reason correctly on the subject, and yet be held guiltless, and not punishable, on the ground solely of a perversion of the moral senses.

Allowed—
S. A. Holmes, Judge.

If a person has sufficient mental capacity to appreciate the nature of his act, if he knows and understands that he is violating the rights of another by an act which is in itself wrong, and which is prohibited by the law, and the commission of which will entail punishment on himself; if he has the capacity thus to appreciate the character and comprehend the consequences of his act, he is responsible to the law for the act thus committed, and must be judged accordingly, regardless of any perversion of the moral senses, however great.

Allowed— S. A. Holmes, Judge.

The jury are instructed that voluntary intoxication or drunkenness is no excuse for crime committed under its influence, and no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.

It is a well-settled rule that drunkenness is no excuse for the commission of crime.

Allowed— S. A. Holmes, Judge.

Insanity, produced by intoxication, does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated, and drunkenness forms no defense whatever to the fact of guilt, for when a crime is committed by a party while in a fit of intoxication, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime.

Allowed— S. A. Holmes, Judge.

Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and for this purpose it must be received with great caution.

Allowed— S. A. Holmes, Judge.

Drunkenness neither excuses the offense nor avoids the punishment which the law inflicts, when the character of the offense is ascertained and determined, but evidence of drunkenness is admissible with reference solely to the question of premeditation.

Allowed— S. A. Holmes, Judge.

In cases of premeditated murder the fact of drunkenness is immaterial. A man who is drunk may act with premeditation as well as a sober one, and is equally responsible for the consequences of his act.

Allowed— S. A. Holmes, Judge.

In murder of the first degree it is necessary to prove the killing was premeditated, which involves, of course, an inquiry into the state of mind under which the party committed it, and, in the prosecution of such an inquiry, his condition as drunk or sober is proper to be considered. The weight to be given to it is a matter for the jury to determine, and it is sufficient for the Court to say to the jury that it should be received with caution, and carefully examined in connection with all the circumstances and evidence in the case.

Allowed— S. A. Holmes, Judge.

That defendant has been examined as a witness upon his own behalf. This is his right to be, and the jury will consider his testimony as they will that of any other witness examined before you. It is proper, however, gentlemen, for the jury to bear in mind the situation of the defendant, the manner in which he may be affected by your verdict, and the very grave interest he may feel in it; and it is proper for the jury to consider whether this position and interest may not affect his credibility or color his testimony.

Allowed—
S. A. Holmes, Judge.

The jury are the sole judges of the evidence in the case. It is for them alone to judge of the credibility of the witnesses, of the weight to be given to the evidence and of its effect and conclusiveness to establish any fact for which it was offered. In so doing they may consider the character, so far as it may appear from the evidence and appearance of the witnesses, the consistency and reasonableness of their statements, and from these and such reasons as may have appeared to the jury upon the case presented, may judge and determine as to the credibility, weight, effect, and sufficiency of such testimony.

Allowed—
S. A. Holmes, Judge.

Under the information in this case the jury may, if the evidence warrant, find the defendant guilty of murder in the first degree, murder in the second degree, or manslaughter. Should the jury entertain a reasonable doubt as to which of the grades of crime named the defendant may be guilty of, if any, they will give the defendant the benefit of such doubt and acquit him of the higher offense. That is to say, gentlemen of the jury, should you be convinced by the evidence beyond a reasonable doubt that the defendant is guilty of a murder, and yet have a reasonable doubt as to whether he is guilty of murder of the first or second degree, you can only find him guilty of murder of the second degree. So if the doubt in your mind be as to whether he is guilty of murder in the first or second degree, or of manslaughter, you can find him guilty of manslaughter only.

Allowed—
S. A. Holmes, Judge.

Should your verdict be one of conviction, you should designate the grade of the offense found. Should your verdict be a conviction of murder in the first degree, the statute permits the jury to award the penalty. This may be death or imprisonment for life in the State's Prison. Should the jury find the defendant guilty of murder in the first degree without affixing any penalty, the law in such cases adjudges the penalty, and that penalty is death. In thus apportioning, the lawmakers have assumed that homicide of the same general nature may be characterized by different degrees of atrocity, and have left the severer penalty to be applied to the higher offense in the sound and discriminating judgment of the jury.

Should your judgment be one of conviction, you should state the degree of the offense of which you convict. Should your verdict be one of acquittal, you will simply say: We, the jury, find the defendant not guilty.

Allowed—
S. A. Holmes, Judge.

If the jury render a verdict of acquittal on the ground of insanity alone, the form of your verdict should be: We, the jury, find the defendant not guilty, on the ground of his insanity.

In any case your verdict must be unanimous, and should be signed by your foreman as such.

Under the information in this case the defendant may be convicted of either murder in the first degree, murder in the second degree, or of manslaughter, as the evidence may warrant under these instructions.

If the jury should believe the defendant, beyond all reasonable doubt, guilty of the crime of murder in the first degree, as defined in these instructions, then you should so find by your verdict.

If you should find the defendant guilty of the crime of murder in the first degree, and think that the death penalty should be inflicted, the form of your verdict will be:

"We, the jury, find the defendant guilty of murder in the first degree."

If you should find the defendant guilty of murder in the first degree, you have the right to determine by your verdict whether he shall suffer death or be imprisoned in the State's Prison of this State for the term of his natural life.

Allowed—S. A. Holmes, Judge.

If you should determine by your verdict that the defendant is guilty of murder in the first degree, and desire that he be imprisoned in the State's Prison for the term of his natural life, the form of your verdict will be:

"We, the jury, find the defendant guilty of murder in the first degree, and fix the penalty at imprisonment in the State's Prison for the term of his natural life."

If the jury believe, from the evidence, to a moral certainty and beyond all reasonable doubt, that the defendant is guilty of the crime of manslaughter, you should so find by your verdict, in which event the form of your verdict will be:

"We, the jury, find the defendant guilty of the crime of manslaughter."

Unless you are entirely satisfied of the guilt of the defendant you cannot find him guilty of any degree of crime, and should return a verdict of not guilty.

Allowed—S. A. Holmes, Judge.

If you find the defendant not guilty, the form of your verdict will be:

"We, the jury, find the defendant not guilty."

In any event your verdict must be unanimous, and be signed by your foreman.

Gentlemen of the jury: This case is now submitted to you for your determination. Carefully and candidly consider and examine all the evidence received in this case, and a true verdict render, as by your oaths you have sworn to do.

[Indorsed:] 651. Superior Court, County of Fresno. The People *vs.* F. O. Vincent. People's instructions. Filed 24th March, 1891. A. C. Williams, Clerk. By W. S. Badger, Deputy.

Not Allowed—S. A. Holmes, Judge.

If the jury have a reasonable doubt from the whole evidence as to whether the defendant, at the time of the commission of the homicide, was insane by reason of long continued use of intoxicating drinks or drugs, or inherited such insanity, which for the time deprived him of his reason so that he did not know right from wrong, you will acquit the defendant.

Not Allowed—S. A. Holmes, Judge.

The Court further instructs you, gentlemen of the jury, that as no insane person can commit a crime, it necessarily follows that if the jury have a reasonable doubt of the defendant's sanity, they must also have a reasonable doubt of his guilt. To doubt his sanity is to doubt his guilt, and to doubt his guilt, if the doubt be a reasonable one, is to acquit, in which case you must find a verdict of not guilty.

[Indorsed:] 651. Superior Court, County of Fresno. The People, etc., *vs.* F. O. Vincent. Defendant's instructions refused. Filed 24th March, 1891. A. C. Williams, Clerk. By W. S. Badger, Deputy.

Verdict.

We, the jurors, find the defendant guilty of murder in the first degree.

W. W. MACHEN,
Foreman.

[Indorsed:] Verdict. Filed 23d March, 1891. A. C. Williams, Clerk. By W. S. Badger, Deputy.

Passing of Sentence Continued.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., April 6, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; George Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE, ETC., *vs.* F. O. VINCENT.	Passing of Sentence Continued.

By request of counsel for the defendant, it is ordered that the time for passing sentence upon the defendant herein be and the same is hereby continued till Wednesday, the 8th inst., at 9 o'clock A. M. of said day.

Motion for New Trial, and Order Denying Motion.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., April 8, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA *against* F. O. VINCENT.	Motion for New Trial—Order Denying Motion—Sentence.

The District Attorney, with the defendant and his counsel, Henry Hogan and S. R. Hart, came into Court. The defendant was duly informed by the Court of the nature of the information filed against him for the crime of murder, committed on or about the 18th day of December, 1890, of his arraignment and plea of not guilty, of his trial, and the verdict of the jury, to wit:

"We, the jurors, find the defendant guilty of murder in the first degree. W. W. Machen, Foreman."

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which defendant, by his counsel, replied that he had, and thereupon moved the Court for a new trial of this case, upon the following grounds, to wit:

That the Court misdirected the jury in matters of law.

That the Court erred in decisions of questions of law arising during the course of the trial.

That the verdict is contrary to law and evidence.

That the Court erred in allowing the jury to be empaneled, for the reason that the original jury in this Court had been drawn from the Great Register of this county instead of from the assessment roll, as required by law; and for the further reason that the special venire issued herein were summoned by an officer who was on the regular venire, and who was excused therefrom for actual bias.

That the Court erred in refusing the defendant's motion for a change of venue.

And upon the further ground that the evidence was insufficient to support the verdict.

The said motion is opposed by the District Attorney and is submitted to the Court without argument, and after duly considering thereof and being fully advised in the premises, the Court orders that the said motion for a new trial of this cause be and the same is hereby denied, to which ruling of the Court the defendant, by his counsel, excepts.

And no sufficient cause being shown or appearing to the Court,

Thereupon the Court renders its judgment:

That whereas, the said F. O. Vincent, having been convicted of the crime of murder in the first degree,

"Wherefore, the judgment of the law and the sentence of the Court is now here, in open Court, and in your personal presence, pronounced against you, which is that you, F. O. Vincent, at the time and place to be designated in the warrant for your execution, shall be hanged by the neck until you be dead."

STATE OF CALIFORNIA, } *ss.*
County of Fresno. }

I, A. C. Williams, Clerk of the Superior Court of the State of California, in and for the County of Fresno, do hereby certify that the foregoing is a full, true and correct copy of an order made and entered on the minutes of said Superior Court, in the above entitled action, on the date mentioned in the caption thereof.

In witness whereof, I have hereunto set my hand and the seal of said Superior Court, this 8th day of April, A. D. 1891.

[SEAL.] A. C. WILLIAMS, Clerk.
By W. S. BADGER, Deputy Clerk.

[Indorsed:] No. 651. Superior Court of the County of Fresno. The People, etc., Plaintiff, *vs.* F. O. Vincent, Defendant. Judgment roll. Filed 8th April, 1891. A. C. Williams, Clerk. By W. S. Badger, Deputy. W. D. Tupper and F. H. Short, Plaintiff's attorneys. S. R. Hart and Henry Hogan, Defendant's attorneys.

Notice of Appeal.

In the Superior Court of the County of Fresno, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA }
against } Notice of Appeal.
F. O. VINCENT. }

To the Honorable Superior Court of the County of Fresno—to the District Attorney of said county, and attorney for the People herein—to the County Clerk of the County of Fresno:

You will please take notice that the defendant, F. O. Vincent, appeals to the Supreme Court of California, from the final judgment of conviction rendered and entered in the above entitled cause on the 8th day of April, A. D. 1891, and also appeals to the Supreme Court of the State of California from the order made and entered on the 8th day of April, 1891, in said Superior Court, denying defendant's motion for a new trial therein.

S. R. HART and
HENRY HOGAN,
Defendant's Attorneys.

Dated April 9, 1891.

[Indorsed:] Filed April 9, 1891. A. C. Williams, Clerk. By W. S. Badger, Deputy.

Bill of Exceptions.

In the Superior Court of the County of Fresno, State of California—Department No. 2, before Hon. S. A. Holmes, Judge.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
F. O. VINCENT.
} Bill of Exceptions.

The above cause came on regularly for trial on the 11th day of March, 1891, whereupon the following proceedings were had:

B. F. Carey, T. F. Schell, D. J. Mullins, A. H. McCrory, J. H. Northcraft, J. O. Byxby, C. P. Walton, Frank Dusy, D. P. Blevins, William Echard, Jr., S. L. Reed, and E. R. Winters, jurors in attendance on Court upon the regular panel, were called and sworn to answer questions touching their qualifications to act as jurors in the above entitled action.

The nature of the case was stated to said jurors, and said above named jurors were examined by the District Attorney for the people, and by the counsel for defendant, touching their qualifications to act as jurors in the said case.

B. F. Carey, T. S. Schell, A. H. McCrory, J. H. Northcraft, J. O. Byxby, D. P. Blevins and E. R. Winters were excused for cause; and D. J. Mullins, C. P. Walton, Frank Dusy, Wm. Echard, Jr., and S. L. Reed were challenged peremptorily by the counsel for the defendant; after which the following named jurors, being in attendance upon the trial of said cause, were called into the jury-box and sworn to answer questions touching their qualifications to act as jurors in said cause, to wit: D. M. Wilson, C. F. Cherry, M. J. Lindrose, Daniel Nichols, A. Harbison, Joseph Burns, Ambrose Cartwright, H. G. Spaulding, J. W. Noland, N. M. Trezevant, W. C. Filloon, and W. A. Linforth, of which last named jurors D. M. Wilson, C. F. Cherry, M. J. Lindrose, Daniel Nichols, Joseph Burns, Ambrose Cartwright, H. G. Spaulding, and N. M. Trezevant, and W. C. Filloon, and W. A. Linforth were excused for cause, and A. Harbison and J. W. Noland were challenged peremptorily by counsel for the defendant.

Whereupon, the following named parties were called as jurors, being in attendance upon said Court as jurors for the trial of said action, to wit: J. L. Kurtz, G. R. G. Glenn, W. H. Gardner, M. R. Madary, John Crawford, W. S. White, J. H. Morrow, J. A. Greenup, Alex Grieve and

C. A. Owen, which exhausted the venire of jurors then present in Court, whereupon the following proceedings were had:

By the Court (to counsel for defendant): Do you consent to go on and examine these, so as to form some idea how many special jurors to order?

Counsel for Defendant: We would like to have a full box, if the Court please.

The District Attorney: The defendant wants a full box before they are sworn to answer a question. I suppose he has a right to that.

The Court: Yes.

The District Attorney: But I suppose a special venire could be issued now.

The Court: Yes. I am obliged to issue it to fill the box. I will make an order that the Sheriff summon seventy-five good and lawful men from the county, and have them returned here by 9 o'clock, Friday, the 13th of March, 1891.

Whereupon the Court charged the jurors then in the box as follows:

You, gentlemen, will be careful and have no conversation among yourselves, and let nobody converse with you or in your presence, in regard to this matter, the facts concerning this matter, and be here at 9 o'clock Friday morning.

On Friday morning, March the 13th, 1891, the following preceedings were had:

Counsel for the defendant stated to the Court: If it is proper at this time, we desire to enter a challenge to the panel, no juror having yet been sworn.

We challenge this panel, because it is formed from persons whose names are not drawn as jurors upon the regular panel, as well as those that are in the box who are on the regular panel, and we make our challenge to fit both, for the reason that we claim that the subsequent venire, although it is a special venire, constitutes this same jury in this action and in this Court. We take the challenge to the panel on the ground of the bias of the officer who summoned them.

We also desire to enter a challenge to the original panel, or what remains of it, on the ground that the provisions of the Code of Civil Procedure of the State of California, which provides for the manner in which trial jurors in Courts of record shall be drawn, has not been complied with in this, that the names of the parties who were selected to serve as jurors in this panel were not drawn, according to the statute, from the assessment roll of this county, but that the Great Register of this county was used in the making up of the list.

Counsel further challenging, says: We challenge this panel and this special venire, this entire panel in this cause; first, upon the ground that that which we may deem, for the purpose of this challenge, the original panel, or what remains of it, ten men, now in the box, remaining now from the original panel, upon the ground that it is not properly drawn by the first officers; in other words, that the provisions of the Codes of the State were not complied with in drawing their names from the assessment roll of this county for the year preceding the one upon which they were drawn. We further challenge the special venire which was issued by this Court for the purpose of filling out this jury which was originally drawn, upon the ground that this particular special panel is formed from persons whose names were not drawn as jurors, and that we take a challenge to the panel on the ground of the bias of the officer who summoned them, and which bias was good ground of challenge to that officer as a juror on the original panel or if he were summoned as a juror now.

To which challenge the District Attorney stated: The People, if the Court please, as to the first cause of challenge, demur to the same on the ground that such challenge, if taken at all to that portion of the jury remaining of the regular panel now in the jury-box, who have not been examined on their *voir dire*, should have been taken before any juror of that regular panel was sworn upon his *voir dire* to answer questions touching his qualifications to act as a juror in this case; and then we deny that challenge upon the facts, as to the second challenge to the special venire, deny the challenge and require proof of the fact.

Whereupon, the following testimony is introduced:

JAMES COLLYER.

Sworn.

MR. HOGAN: What is your name? A. James C. Collyer.

Q. What position, if any, do you occupy in this county? A. Under Sheriff.

Q. Who is the Sheriff? A. J. M. Hensley.

Q. Yes, sir. I suppose you are aware of the case of The People of the State of California against F. O. Vincent? A. I have heard of it; yes, sir.

Q. On trial in Department No. 2. of the Superior Court of the County of Fresno, State of California? A. Yes, sir.

Q. As the Under Sheriff, you are familiar with the duties and the performance of the work of the Sheriff's office of the county in the last few days? A. Yes.

Q. What has been done there? A. I know something about it.

Q. You are the gentleman who has charge of the office work generally? A. Yes, sir.

Q. Do you remember of receiving an order from this honorable Court dated the 11th day of March, 1891, under the seal of the Clerk of this Court, attested by A. C. Williams, by W. S. Badger as Deputy Clerk of this county? A. I remember receiving a venire for jurors. I don't know who it was attested by; I don't remember.

Q. (Handing paper to witness.) Are you acquainted with Mr. Badger's signature? A. Yes, sir.

Q. Is this his signature attached to this document? A. Yes, sir.

MR. TUPPER: We admit that, Mr. Hogan; that the venire was issued by this Clerk.

MR. HOGAN: Q. In pursuance of that order, the executive officer of this county proceeded to summon, as per the order of this Court, seventy-five talesmen as jurors to appear here to-day? A. Yes, sir.

Q. Who made the service? A. Mr. Picket, Mr. McCrory, and McArdle.

Q. McCrory? A. Yes, sir.

Q. Is Mr. McCrory the gentleman who was summoned as a juror in this case before? A. I think he was; yes.

MR. HOGAN: Will you admit that this was the same Mr. McCrory?

MR. TUPPER: Well, I want to see.

Q. Is it the same McCrory that was here on the regular panel? A. I think so.

THE COURT: A. H. McCrory? A. A. H. McCrory, of Kingsburg.

MR. TUPPER: Q. He is Deputy Sheriff? A. He is Deputy Sheriff.

Q. You say he summoned some of these jurors? A. He summoned the first twenty-five that appear on the returns.

MR. TUPPER (to the reporter): Well, now, will you please read what Mr. McCrory said the other day?

[The reporter here reads the examination of A. H. McCrory when called and sworn on his *voir dire* on March 11, 1891, as follows]:

"MR. HART: Q. Mr. McCrory, where do you reside? A. Down to Kingsburg.

"Q. How long have you lived in California? A. I was born in California.

"THE COURT: Answer the question 'how long.' A. Twenty-nine years last October.

"Q. (By Mr. Hart): How long have you lived in Fresno County? A. About 23 years—22 or 23. I believe I came to Fresno County in '61—I mean to say in 1865.

"Q. What is your business? A. What was it, you said?

"Q. What is your business? A. I have been saloon-keeper and Constable for the last two years previous to the first of January, this year.

"Q. Are you assessed on the last assessment roll? A. Yes, sir.

"Q. Have you heard anything which purported to be a statement of the facts in this case at bar? A. Yes, sir; I have read it in the 'Expositor,' and heard it talked of.

"Q. Have you talked with any one who purported to know anything about the facts of this case? A. Yes, sir.

"Q. A witness in the case? A. No; I don't know that I ever talked with any of the witnesses in the case.

"Q. Have you expressed an opinion in regard to the case? A. Yes, sir.

"Q. Is that a qualified or unqualified opinion? A. Well, it is a qualified opinion.

"Q. Do you think it would require evidence to remove it? A. Yes, sir; it would require evidence.

"Q. A great deal of evidence? A. I think it would.

"MR. HART: We challenge the juror for the existence of that state of mind—

"MR. TUPPER: We don't resist."

Whereupon, the challenge to the panel of the special venire was not resisted by the District Attorney.

The Court thereupon made the following order in regard to said special venire:

You, gentlemen, who were summoned as jurors on this special venire, a challenge having been taken to the special venire on the ground of the manner in which they were selected, and that challenge being considered good by the Court, the gentlemen who were summoned on that special venire are excused from any further attendance on the Court.

Whereupon, the challenge of counsel for the defendant to the ten jurors remaining in the box of the original panel was allowed, and said jury were excused from any further attendance upon Court.

The Court thereupon ordered that a special venire issue for one hundred jurors, returnable at 10 o'clock, March the 14th, 1891.

Whereupon, the District Attorney gave notice to counsel for the defendant that upon the special venire ordered by the Court to be in attendance to try this case, that the defendant should have the right to twenty peremptory challenges upon said special venire.

On March the 14th, 1891, this case was regularly proceeded with, the special venire of a hundred jurors being in attendance upon Court, the counsel for defendant interposed a challenge to the panel of said special venire, on the following grounds, to wit:

The objection is based upon Section 1064 of the Penal Code of this State. We challenge this panel because it is formed from persons whose names are not drawn as jurors; in other words, that it is a special venire. We take the challenge to the panel on account of the officer who summoned them, and which would be a good ground of challenge to a juror. We make this challenge in the same form and ask that it be determined in the same manner as if this panel were a single juror. We ask this Court to be enabled to give such evidence here as will show to the Court that a regular panel was drawn in this county from the Great Register of this county, and not from the assessment roll; that a portion of that panel was called into the box in this case; that a challenge was interposed to that panel and the challenge allowed and the panel discharged, and that there is not now in this Court or in this case any regularly impaneled jury or any jury drawn for the term; further, that the special venire that was issued subsequent to the exhausting of the first improperly drawn panel in this Court was objected to upon the ground that the panel was formed from persons whose names are not drawn or were not drawn as jurors, and the objection made to the panel before on account of the bias of the officer who summoned them, and which would have been good ground of challenge to the juror.

It appeared upon the trial of this case and of that question that the officer who summoned this special venire, one A. H. McCrory, was a Deputy Sheriff of the county; and further, that he had been a juror upon the first irregularly drawn panel, and had been examined in the box and under the challenge made by the defendant for actual bias, under the second subdivision of Section 1073, was excused by the Court. Upon such showing the Court then, and at that time, allowed that challenge and discharged the venire. Now, upon this return of the present venire, there are at least some seventeen men, if not more, who were upon the special venire which was discharged from this Court, as jurors for the trial of this cause. We challenge the panel upon that ground, and in support thereof cite Section 1064 of the Penal Code of the State of California, and also depend upon, in this objection, upon the following section of said Code, to wit, 1065.

The sufficiency of the facts alleged as a ground of challenge was denied by the District Attorney, and the following proceedings were had:

TESTIMONY OF L. L. BOONE.

Sworn.

MR. HOGAN: Mr. Boone, you were summoned as a juror yesterday? A. To appear yesterday.

Q. In this town? A. Yes, sir.

Q. City of Fresno? A. Yes, sir.

Q. Were you summoned to appear here to-day? A. Yes, sir.

Q. At ten o'clock this morning? A. Yes, sir.

Q. By an officer of this county? A. Yes, sir.

Q. Were you summond—were you on the other panel that was discharged the day before? Were you summoned at Selma? A. No, sir.

Q. Were you summoned on the other panel? A. I was summoned to serve on the panel that was discharged yesterday.

Q. That is what I mean. You were summoned to serve on the special venire returned yesterday morning at 9 o'clock? A. Yes, sir.

Mr. Tupper: In other words, you were summoned on both venires? A. Yes, sir.

Mr. Hogan: That is all, sir.

Mr. Tupper: Now, Mr. Boone, who summoned you on the first panel? A. Mr. Pickett, I think, is the gentleman's name.

Q. Who summoned you on the second panel? A. A man by the name of Smart, I think, is on the paper.

Q. Do you know one A. H. McCrory at Kingsburg, a Deputy Sheriff? A. I don't think I do.

Q. Were you summoned either time by Mr. McCrory? A. No, sir.

Mr. Tupper: That is all.

Mr. Hogan: That is all, Mr. Boone.

Testimony of E. M. Russell.

Sworn.

Mr. Hogan: Mr. Russell, were you summoned on both venires? A. Yes, sir.

Mr. Hogan: That is all, sir.

Mr. Tupper: Who summoned you on the first venire? A. Mr. McCrory.

Q. Where did you live? A. Near Selma.

Q. Near Selma? A. Yes, sir.

Q. Mr. McCrory summoned you on the first venire? A. Yes, sir; Mr. McCrory, I think, had my name on the first venire, E. D.

Mr. Tupper: That is all.

Testimony of A. D. Jones.

Sworn.

Mr. Hogan: Mr. Jones, were you summoned on both venires? A. Yes, sir.

Mr. Tupper: Q. Who summoned you on the first? A. Mr. McCrory.

Q. What is your name—A. B. Jones? A. A. D. Jones.

Q. Do you live near Selma? A. I do.

Testimony of W. S. Hopkins.

Sworn.

Mr. Hogan: Q. Mr. Hopkins, were you summoned on both venires? A. Yes, sir.

Mr. Tupper: Q. Who summoned you on the first? A. Mr. McCrory.

Mr. Tupper: That is all.

Testimony of D. Dismukes.

Sworn.

Mr. Hogan: Q. Were you summoned on both venires? A. Yes, sir.

Mr. Tupper: Q. Who summoned you on the first? A. Mr. Pickett.

Q. You were not summoned by Mr. McCrory? A. No, sir.

Mr. Tupper: That is all.

TESTIMONY of D. D. REED.

Sworn.

MR. HOGAN: Q. Mr. Reed, were you summoned on both venires? A. Yes, sir.

Q. Who summoned you on the first? A. Mr.——, I forget his name.

Q. Were you summoned by Mr. McCrory? A. No, sir.

Q. Not summoned by him either time? A. No, sir.

TESTIMONY of S. B. HOLTON.

Sworn.

MR. HOGAN: Q. Mr. Holton, were you summoned on both venires? A. I was.

MR. TUPPER: Q. Who were you summoned by on the first venire? A. I don't know his name; a gentleman in Selma; an officer there.

Q. Was it Mr. McCrory? A. I think so; I think he was on the stand yesterday in the examination.

Q. What? A. I think that was the same man on the stand yesterday—the officer. I don't know his name.

Q. He wasn't on the stand here yesterday—a man named McCrory—with a sandy mustache. I think he lives in Kingsburg. A. I never saw him before—the man.

Q. You think it was him? A. I don't know.

Q. You don't know whether it was? A. I don't know whether it was.

Q. Where were you summoned? A. In Selma.

Q. In Selma? A. Yes, sir. I think I would know him if I would see him.

Q. Have you got your—— A. Not with me.

Q. Your notice of summons? A. Not with me.

MR. TUPPER: I presume he was the officer. That is all.

TESTIMONY OF W. R. WOOD.

Sworn.

MR. HOGAN: Mr. Wood, were you summoned on both venires? A. No, sir.

MR. HOGAN: That is all, sir.

MR. TUPPER: That is all. Is there another gentleman named Wood in the room?

MR. C. R. WOOD: C. R. Wood.

MR. TUPPER: Mr. Wood, you take the stand.

TESTIMONY OF C. R. WOOD.

Sworn.

MR. TUPPER: What are your initials, Mr. Wood? A. C. R.

Q. (By Mr. Hogan.) Were you summoned on both venires, Mr. Wood? A. Yes, sir.

MR. TUPPER: Q. Who were you summoned by? A. Mr. McCrory, in Selma.

MR. TUPPER: That is all.

TESTIMONY OF C. HENRY.

Sworn.

MR. HOGAN: Q. Mr. Henry, were you summoned on both venires? A. I was.

MR. TUPPER: Q. Who summoned you on the first? A. Mr. McCrory.

MR. TUPPER: That is all, sir.

TESTIMONY OF ROBERT STALEY.

Sworn.

MR. HOGAN: Q. Were you summoned on both venires, Mr. Staley? A. Yes, sir.

MR. TUPPER: Q. On the first one by Mr. McCrory? A. Yes, sir.

TESTIMONY OF DONALD BRUCE.

Sworn.

MR. HOGAN: Q. Mr. Bruce, were you summoned on both venires? A. Yes, sir.

MR. TUPPER: Q. Who summoned you on the first? A. Mr. Pickett.

MR. HOGAN: Now, if your Honor please, that is all the names I have got marked, but I would ask your Honor, on the part of the defendant, now to ask any of the other jurors whose names have not been read and who are present, summoned on both venires, to make it now known to the Court.

MR. TUPPER: No objection. Ask them to step around and take their seats in the jury-box.

MR. HOGAN: Well, any of the gentlemen who are jurors, here present in this Court-room, who were summoned on both venires, will kindly step forward.

MR. TUPPER: Any parties who were summoned to be here yesterday, and summoned to be here to-day, will come around, except those that we have examined. Will you gentlemen be kind enough to give your names? Your name, please?

The following jurors gave their names: A. A. Hoffman, N. Martin, R. M. Crow, J. W. Wilkins, C. G. Anderson, M. B. Garner, T. B. Snedden, Charles Moore, H. Larsen, A. B. Ward, and H. F. Berry.

MR. TUPPER: Very well. Now, to expedite matters, Mr. Hogan, let them all be sworn at once.

MR. HOGAN: Yes, sir.

MR. TUPPER: Swear them all to answer questions upon the matter to be submitted to them.

The eleven talesmen are here sworn to answer questions.

MR. TUPPER: Mr. Hoffman, who summoned you on the first venire? A. Mr. McCrory.

Q. Mr. Martin, who summoned you? A. Mr. McCrory.

Q. And you, Mr. Crow? A. Mr. McCrory.

Q. And Mr. Wilkins, who summoned you? A. Mr. Pickett.

Q. Mr. Anderson, who summoned you? A. I don't know the gentleman's name. One of the Deputy Sheriffs here.

Q. It wasn't McCrory, who lives at Kingsburg? A. No.

Q. I mean the first time? A. No.

Q. Mr. Garner, who summoned you? A. Mr. McCrory.

Q. Mr. Snedden? A. Mr. McCardle.

Q. Mr. Moore, who summoned you? A. McCardle.

Q. Mr. Larsen, who summoned you? A. McCardle.

Q. Mr. Ward, who summoned you? A. Pickett.

Q. Mr. Berry, who summoned you? A. Pickett.

Mr. Tupper: There are only four, Hoffman, Martin, Crow, and Garner, and there are eleven altogether.

The Court denied the challenge, to which ruling of the Court the defendant excepted.

Examination of E. M. Russell.

First duly sworn, touching his qualifications to act as a juror herein.

Mr. Hogan: Mr. Russell, do you know anything about the case, Mr. Russell? A. No; I couldn't say that I do. I think at the time that the crime was committed I read a little sketch or the heading of it.

Q. Not enough to make up your mind about it? A. No; I had forgotten all about the case——

Q. Until you were examined? A. Yes, sir.

Q. Are you a married man? A. I am.

Q. Have you any daughters, Mr. Russell? A. Yes, sir.

Q. Are they married? A. No.

Q. Have you any bias or prejudice against this defendant? A. No, sir.

Q. Would you give him a fair and impartial trial if you were accepted as a juror in this case? A. I would.

Q. You wouldn't allow any of these outside influences we have been talking about here to weigh in your mind one way or the other in deciding the case here? A. No, sir.

Q. You would decide it according to the evidence given here, and under the instructions of the Court, if you are accepted as a juror? A. I certainly should.

Q. You would not allow any outside feeling to weigh either one way or the other, would you, in reference to the case? A. No.

Q. Would it make any difference to you that the defendant is charged with having killed a woman? A. No, sir.

Q. If the Court told you that the law did not make any difference between a man and a woman as far as the defense itself was concerned, you would take that in consideration? A. I certainly would.

Q. Are you biased or prejudiced against a man who takes intoxicating liquors? A. No, sir.

Q. Are you biased or prejudiced against a plea of insanity in cases when it is properly presented? A. No, sir.

Q. You believe that every man has a right to place such a plea before the Court as well as the plea of self-defense, or any other legitimate legal plea? A. Yes, sir.

Q. Are you biased or prejudiced against the belief that men can have hereditary diseases and inclinations come down from father to son? A. No, sir.

Q. You are not opposed to such a belief as that? A. No, sir.

Q. Do you know of anything now in any manner personal to yourself that would prevent you from giving this defendant a fair and impartial trial if you were chosen as a juror in this case? A. I do not.

Q. You will, if you are taken, give him that? A. Yes, sir.

Q. Give him the benefit of every doubt? A. Yes, sir.

Mr. Hogan: Pass the juror.

Mr. Tupper: You say you don't know the defendant, Mr. Russell? A. No, sir.

Q. You live in Kingsburg? A. I live just west of Kingsburg.

Q. You know of nothing to prevent you from acting fairly and impartially in the case? A. No, sir.

Q. Are you a Mason, Mr. Russell? A. I am not.

Q. Mr. Russell, have you ever sat on a jury in a murder case? A. I have.

Q. In this county? A. Yes, sir.

Q. What case was it? A. I think it was the China case from Madera.

Q. It was a China case? A. Yes, sir.

Q. What are your views on the subject of capital punishment, Mr. Russell? A. I think it is good——

Q. You think it is a good law? A. Yes, sir.

Q. Ought to be enforced in proper cases? A. Yes, sir.

Mr. Tupper: Pass him.

Mr. Hogan: Q. Mr. Russell, you sat on a murder case—the Chinese case? A. Yes, sir.

Q. Was the Chinaman convicted of murder by the jury, or do you remember? A. I think he was.

Mr. Tupper: Q. Mr. Russell, you were summoned on the first venire? A. I was.

Q. And on the second special venire? A. Yes, sir.

Q. Summoned by Mr. McCrory? A. Yes, sir; I was.

Q. Where were you summoned? A. I went to lodge that evening in Selma.

Q. What lodge was that? A. Knights of Pythias.

Q. Mr. Russell, did Mr. McCrory tell you what case it was when he summoned you? A. No, sir; he just handed me the paper as I was walking by him and I asked him what that was and he says: "You will appear at Court——"

Q. As a juror? A. Yes, sir—"Friday at 9 o'clock." I supposed then it was at Kingsburg. I went on and afterwards I looked at the paper and saw what it was.

Q. Did you ever have any conversation with Mr. McCrory in reference to this case? A. No, sir.

Q. Would the fact that you were summoned as a juror on the special venire by Mr. McCrory in any manner affect your mind in arriving at a verdict in this case if you were selected as a juror? A. No, sir.

Q. You have no prejudice or bias against this defendant? A. Not at all.

Q. And nothing in his past life that you know of would cause any prejudice against him in your mind? A. No, sir.

Q. Nothing to prevent you from acting with entire impartiality? A. No, sir.

Q. You were on the last assessment roll of this county? A. I am. I am perfectly ignorant, you might say, about the case.

Q. Well, you will pardon these questions, but you understand some point was raised about Mr. McCrory? A. Certainly.

Mr. Hogan: We pass the juror.

The Court: Fill the box.

EXAMINATION OF A. D. JONES.

First duly sworn, touching his qualifications to act as a juror herein.

Mr. Tupper: Mr. Jones was summoned on both venires.

Mr. Hogan: Do you want him or not?

Mr. Tupper: I just simply informed you of that fact.

Mr. Hogan: Mr. Jones, do you know anything about the case? A. Only what I read.

Q. You live down at Selma? A. Yes, sir; in that vicinity.

Q. Farmer by occupation? A. Farmer and stockraiser.

Q. How old a gentleman are you? A. About 65.

Q. Gentleman of family? A. Yes, sir.

Q. Daughters? A. Yes, sir.

Q. Married? A. Yes, sir.

Q. How many? A. One married, and one son.

Q. They reside in the county? A. Yes, sir.

Q. How long have you resided in Fresno County? A. I have been in the county twelve years.

Q. What State are you a native of? A. I was born in New York, principally lived in Illinois, and from there to Iowa, and Iowa here.

Q. What portion of New York? A. Near Oswego.

Q. Near Oswego. How long did you live in Iowa? A. I lived in Iowa seven years.

Q. Then came on farther westward? A. To California.

Q. Where were you married? A. Married in Iowa.

Q. Married in Iowa? A. Yes, sir.

Q. Were you ever a juror in a criminal case before? A. Yes, sir.

Q. In this county? A. Yes, sir.

Q. Murder case? A. Yes, sir.

Q. Was the man convicted or acquitted? A. Well, some was convicted and some was not. I have been on several.

Q. You have been on several? A. Yes, sir.

Q. Have you any bias or prejudice against any man by reason of the fact that he has been informed against by the District Attorney, or indicted by a Grand Jury, from that alone? A. No, sir; not until he is proven guilty.

Q. Sir? A. Not until he is proven guilty.

Q. You recollect men that were innocent, or that you believed to be innocent, to have been brought into Court and tried? A. Yes, sir.

Q. You would take—having been a juror before, you know that the rule is to take the evidence according to what is given in Court, and not anything that you may have heard on the outside? A. Yes, sir.

Q. Do you think that you are possessed of that class of mind that you could lay aside any prejudice that you might hear on the outside, and judge simply by the evidence given here on the stand under the rules of law, under the direction of the Court? A. I do; I think that is my duty.

Q. You think that would be your duty? A. Yes, sir.

Q. Yes, sir; that is a juror's duty, but can you do that? A. I can.

Q. You will lay aside what you may have heard about this case, whatever you may have heard on the outside, and try it according to what came in here? A. Yes, sir.

Q. All outside you would take as hearsay? A. Yes, sir.

Q. You have not now—you could not now find a verdict, if this case was submitted to you, that Mrs. Vincent even was dead, could you? A. No; I could not.

Q. You don't know whether she is dead or not? A. I don't know whether she is dead or not.

Q. You didn't see her dead? A. No, sir.

Q. You have not had any evidence in a Court of justice showing you to your own knowledge that she was dead? A. No, sir.

Q. Or that Mr. Vincent, or Mr. Tupper, or myself killed her? A. No, sir.

Q. You would be governed by what evidence would be produced on the stand here as to whether she was dead, or as to who killed her? A. Yes, sir.

Q. Have you in your mind now any bias or prejudice for or against this defendant? A. No, sir.

Q. In any manner in the world? A. No, sir.

Q. Do you know anything in your past life, or in your own history, or in your own mind, that would prevent you from giving this man a fair and impartial trial if you were accepted by the Court as a juror in this case? A. I do not.

Q. You would give him a fair trial under all the evidence taken here? A. Yes, sir.

Q. Have you any opinion as to his guilt or innocence now? A. None.

Q. Although you have not heard about the case? A. Yes, sir.

Q. Are you acquainted with any of the witnesses in the case? A. No, sir.

Q. Mrs. Johnson, Mrs. Redd, and Mr. Ragsdale, and some other gentlemen and ladies? A. Acquainted with none of them.

Q. Sir? A. Acquainted with none of them.

Q. From the fact that there have been other homicides committed in this county, not more so than other counties in this State and other States, but from the fact that there have been several come to trial recently here, would that make any effect with you in your mind in trying this defendant? A. No, sir.

Q. You would give him just as fair a trial as if this was the only case before the Court this term? A. I would.

Q. If there should be any popular feeling against this class of cases, that wouldn't weigh in your mind in deciding whether he was guilty or innocent, if you were taken as a juror here? A. No, sir.

Q. If the Court should instruct you that the law of the land is that a man must, in order to be convicted of a criminal charge, be proven by the prosecution to have committed the act, and to have had the intention to commit the act at the time he committed it, and you found that he had committed the act, but that there was such evidence as satisfied you that he didn't know what he was doing when he did it, and if such was the case a crime could not be committed and he was not responsible, would you acquit him? A. I would.

Q. You have, then, no prejudice on account of the fact of it being a plea that is sometimes abused, the plea of insanity; you have no prejudice against that plea as a plea? A. No, sir.

Q. You wouldn't have any prejudice against a man because he simply put that plea in? A. No, sir.

Q. Any more than you would if one man was charged with shooting another with a pistol or a shotgun, and he claimed he did it in self-defense? A. No, sir.

Q. You would not have any more prejudice against this plea because it was insanity than against the plea of self-defense? A. No sir.

Q. Or against an alibi, a man proving he was not there when the offense was committed? You wouldn't have any more prejudice against this plea on account of its being insanity, would you? A. No, sir.

Q. You believe that there are men who are insane? A. I do.

Q. You believe that there are men who, by reason of some fact, either coming through a dispensation of Providence, or through some act of God, or nature, that they lose their mind, do you not? A. Yes, sir.

Q. Have you got any prejudice or bias against a man because he uses or is addicted to the use, either inordinately often or otherwise, of intoxicating liquors? A. I don't approve of a man using intoxicating liquors. If a man done an act when he was insane then he would be excused.

Q. But my question was, would you have any prejudice against a man charged with an offense simply because he was a drinking man? A. No, sir.

Q. You feel that men are better without drinking? A. I do.

Q. That is your belief? A. That is my belief, sir.

Q. But from the fact that men do do it, that some men do drink, you would not condemn them alone on that account, would you? A. No, sir.

Q. Have you any prejudice or bias against the belief of medical men, especially if testimony should be produced to satisfy you from medical men that they believe that a man could have those tendencies passed down to him from father to son, the same as he might have near-sightedness or deafness, desires for drinking, desires for the use of drugs —would you think that that could not be possible, or have you any prejudice against that belief? A. I feel that it is hereditary.

Q. You believe in heredity? A. Yes, sir.

Q. Both in insanity—— A. Yes, sir.

Q. Desires for drink—— A. Yes, sir.

Q. Desire for gambling, with some men—— A. I do; yes, sir.

Q. Near-sightedness in other men, deafness in some people, disease or consumption in others? You believe that a father can give to his son and the son not knowing it, those influences? A. I do.

Q. You have no disbelief against that theory? A. No, sir; I have no disbelief.

Q. If it was shown to you that in the commission of an act the man's mind was in such a state from the use of intoxicating liquors, from the use of narcotics, the use of drugs, that he was not in a condition to be able to appreciate his acts, and the Court would instruct you that if you found that to be the fact, would you take that instruction and give the prisoner the benefit of that? A. I would.

Q. Do you think you can act if you were taken as a juror in this case fairly in every sense, laying aside any outside prejudices or causes, and act as one citizen ought to act toward another in the jury-box if you are accepted as a juror in this case? A. I think I could.

Mr. Hogan: Pass the juror.

Mr. Tupper: Q. Mr. Jones, are you opposed to capital punishment? A. No, sir.

Q. You think it is a good law? A. Yes, sir.

Q. Do you think it ought to be enforced in proper cases? A. I do.

Q. Have you any personal acquaintance with the defendant? A. No, sir.

Q. Are you a Mason? A. Sir?

Q. Are you a Mason? A. No, sir.

Q. Sir? A. No, sir.

Q. You know of nothing whatever now to prevent you from acting fairly to the People in this case, as well as to the defendant? A. I do not.

MR. TUPPER: Pass him.

MR. HOGAN: Pass him.

Out of said venire of one hundred jurors, the following were sworn to try the case, to wit: H. P. Holmes, J. J. Elwell, A. D. Jones, H. L. Nudd, E. M. Russell, W. Buchanan, John Cobby, W. W. Machen, J. E. Pollard, and Byron Van Valkenberg. Whereupon, a special venire was issued for forty jurors, returnable at 2 o'clock on March the 18th, 1891, at which time the following proceedings were had:

After an examination of several jurors touching their qualifications as jurors, the following two jurors were accepted and sworn as jurors in said case out of said venire of forty, to wit: John McGarry and Charles Clarke.

In the selection of the jury in this case the defendant exercised only seventeen peremptory challenges.

In support of the motion for a change of venue, the defendant introduced the following affidavits:

In the Superior Court of the County of Fresno, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
F. O. VINCENT.

STATE OF CALIFORNIA, } *ss.*
County of Fresno.

F. O. Vincent, being first duly sworn, on his oath, deposes and says, in furtherance of his motion for a change of venue of this cause, made this day, and verifying his said application to this Court: That he is the defendant in this cause; that he has been informed against by the District Attorney of this county in this Court of the crime of murder, alleged to have been committed in this county on the 18th day of December, 1890; that he is therein charged with unlawfully and feloniously, and of his malice aforethought, killing one Anna L. Vincent; that he believes it is impossible for him to have a fair and impartial trial in the county of Fresno, owing to the great prejudice and bias existing in said county against him; that he believes and alleges the fact to be that the people of this county are greatly prejudiced against him, for many reasons, and that, in support of this belief, and in support of this motion, he states the facts and circumstances in this affidavit contained; that special counsel for the prosecution has (as defendant has been informed, and believes and so states the facts to be) been employed to assist an already able District Attorney to conduct the prosecution of this case, notwithstanding the fact that the said District Attorney of this county has an Assistant District Attorney learned in the law to assist and help him in the preparation and trial of this case, and that said Deputy District Attorney is assisting and helping in the prosecution of this case; that the affiant is informed and believes that the citizens of Fresno County, or some of them, have contributed to pay said assistant counsel alleged herein to be other than said District Attorney and his said assistant, and that said special counsel is so assisting and lending aid to said public prosecutors by reason of his said employment; that within the year last past in the county of Fresno a very great number of homicides have occurred, fast following one on the other; that it is a fact of public knowledge that J. D. Fiske that was killed on the streets of Fresno; that a negro woman was shot and killed in Fresno by a man named Mars; that a man named Bradway was killed; that a defendant named Sullivan is now awaiting trial for killing of one Corrick in this county; that in the county jail of this county are now two men convicted within a few weeks last past, one for manslaughter, the other murder; that many other homicides not now occurring to your deponent have transpired recently; that many other felonies have been committed in a short time in this county; that many people of the county are not entirely satisfied with the fact that no death penalty has yet been meted out to alleged offenders; that the public press of this county has repeatedly called the attention of readers to the fact that a stop must be made to offenses against the law; that the people of this county have and do feel under present existing circumstances that an example should be made of some one; and, as your deponent verily believes the fact to be that public opinion has to a large extent centered upon this deponent as a subject to make such example of; and that such feeling on the part of many of the people as deponent believes to exist is wrought up to its present pitch by reason of the aforesaid allegations, and that such feeling against him is not in any manner warranted by all the facts in his case, when a cool and unbiased knowledge of his defense can be made known to the people; that very many jurors have already been examined in his case and none as yet have been qualified to give him an impartial trial; that the examination of the talesmen called and examined to be sworn in as jurors to give him an impartial trial shows that, being, as they are, drawn from all parts of the county, that the prejudice and bias against him is widespread, that the offense with which he is charged and which this Court must try, on its face is believed by great numbers of people of this county who are not familiar with all the circumstances surrounding this alleged homicide to have been unwarranted and atrocious; that the difficulty to secure an impartial jury is entailing great expense upon the county, and great inconvenience upon its citizens, thus intensifying the ill-feeling of the taxpayers and the talesmen who are necessarily summoned and brought away from their homes to be in attendance upon this Court for this trial; that subsequent to the date of said alleged homicide, as your deponent has lately been informed and believes, and for such reason here alleges the fact to be, many citizens of this county upon the public streets asserted their belief that the defendant should be illegally dealt with and taken from the custody of the officers of the law and be deprived of his life. That owing to telegraphic communications with other parts of the world and the publishing of news by papers circulating in this county, printed here and in other places, the people of this county have learned that a mob of many citizens of the city of New Orleans, in the State of Louisiana, took violently into their own hands the law and without due course of law killed men alleged to have committed murder, and as your deponent is informed and believe and fears that such an act so committed and so known to have been committed has tended to increase the desire your affiant believes exists in this county to destroy his life without due process; and your affiant verily and truly believes from his knowledge of all these things that he cannot secure that fair and impartial trial the laws of this country grant every man, in this county; nor that he can secure his constitutional rights in regard to his trial at any time within this county; that, subsequent to his being held to answer, citizens of this county circulated a petition asking for a speedy trial of his cause, which said petition was addressed to this, as defendant understands, honorable Court and the prosecuting officer of this county, and was given widespread circulation throughout the public places and the private houses of this county by the newspapers published herein; that your affiant truly believes that, under the existing state of circumstances, he cannot have a fair and impartial trial within the county of Fresno.

F. O. VINCENT.

Subscribed and sworn to before me, this 17th day of March, A. D. 1891.

A. C. WILLIAMS,
Clerk.
By W. S. BADGER,
Deputy.

AFFIDAVIT OF HENRY HOGAN. (After the title of the Court and cause.)

STATE OF CALIFORNIA, } ss.
County of Fresno. }

Henry Hogan, being first duly sworn, deposes and says: That he is an attorney at law, and, by virtue thereof, and of his oath, an officer of the Courts of this State; that in the fulfillment of his duty as such attorney he came to Fresno, in this county, to act as an assistant counsel in the case of this defendant, charged with murder; that he arrived here after the case had been called in this Court, and after the examination of the talesmen summoned in this case had been commenced; that he was not familiar with the facts of the case; that he had been suddenly summoned into the case by reason of the inability of Hon. G. G. Goucher to assist Mr. S. R. Hart, associate counsel in this case; that he deemed it his duty to go among the people whenever he could to find evidence in this case; that he met many citizens of Fresno City; that he made diligent inquiry to find facts in the case; that in such investigation he discovered that a great prejudice existed against the defendant, growing, as the defendant believes, and therefore alleges the fact to be, from the reason that many offenses have been alleged to have been of late committed in this county; that many people believed the defendant in this case to be guilty of the offense charged, even before he had had his trial; that, after going into the examination of talesmen to ascertain their qualifications as jurors, and finding from their sworn testimony in open Court that they came from different locations in this county, that he thus acquired a knowledge that the fact exists that the people of many of the different portions of this county, as well as those residing near the county seat, had become biased and prejudiced against this defendant, and to a large degree biased and prejudiced; that from all the knowledge your affiant could gain of this community, and of the citizens thereof, and of their opinions and feelings, your affiant feels that he can safely make affidavit that from his source of information he can give testimony that he verily believes that this defendant cannot obtain a fair and impartial trial in the county of Fresno, not from any fact that the prosecuting officers would do less or more than their duty, or that the honorable Court of this county would do other than exact an impartial justice, but that the feeling and popular opinion prevalent in this county is such that your deponent verily believes that this defendant cannot secure, all things considered, such a fair and impartial trial as the laws of the land warrant, and should give him as a citizen.

HENRY HOGAN.

Subscribed and sworn to before me, this seventeenth day of March, A. D. 1891.

A. C. WILLIAMS,
Clerk.
By W. S. BADGER,
Deputy.

AFFIDAVIT OF S. R. HART. (After the title of the Court and cause.)

STATE OF CALIFORNIA, } ss.
County of Fresno. }

S. R. Hart, being first duly sworn, says that he is one of the attorneys for the defendant; that as such he has sought evidence among the people on behalf of the defendant; that he is acquainted with many people in the county of Fresno; that since the ending of the criminal trial just preceding the commencement of this action, he has found an intense feeling against this defendant; he has been informed, and believes, that a great many people in this county are biased and prejudiced against this defendant, knowing that many criminal cases, and particularly homicides, have recently occurred in this county; he now finds among the people, as far as he knows, an expression and feeling that this defendant be convicted, and that the defendant cannot, in belief of affiant, safely go to trial in this county; that he cannot have a fair and impartial trial herein.

S. R. HART.

Subscribed and sworn to before me, this 17th day of March, 1891.

A. C. WILLIAMS,
Clerk.
By W. S. BADGER,
Deputy.

AFFIDAVIT OF S. R. HART. (After the title of the Court and cause.)

STATE OF CALIFORNIA, } *ss.*
County of Fresno. }

S. R. Hart, being first duly sworn, on his oath deposes and says: That he is an attorney at law and is one of the attorneys for the defendant, charged with murder. That said defendant was held to answer, informed against, and arraigned, and pleaded not guilty to the information. That subsequent to his plea of not guilty the case of the defendant was set down for trial on the 2d day of March, 1891. That in said Court at the time of the setting of this case for trial, there had already been other felony cases called up regularly, to wit; The case of the People *vs.* Lane, charged with murder; the People *vs.* Smith, also chaged with murder; the People *vs.* Sullivan, also charged with murder; the People *vs.* Williams *et al.*, charged with arson; the People *vs.* ———, charged with burglary; that many days were consumed in the trial of these cases; that they were cases of importance, and that the affiant was unable to know with any considerable degree of certainty when the case of the People *vs.* Vincent would be reached for trial. That the trial of the case of the People *vs.* Smith, charged with murder, was completed on the — day of March, 1891. That the case of the People *vs.* Williams *et al.* was to be tried subsequent and following the trial of the People *vs.* Smith; that affiant has been informed by counsel for the defendant in the Williams cases that two or three weeks would be occupied in the trial of these Williams cases; that the People *vs.* Vincent, as affiant believes, would not be reached for trial until about the first of April; that on the close of the case of the People *vs.* Smith, for good and sufficient cause, the Court continued the trial of the Williams arson cases, and on sudden notice the case of Vincent, the defendant herein, was immediately called, and on a half day's notice called for trial. That Hon. G. G. Goucher had been retained to assist affiant in the trial of this case; that the said Goucher, an attorney of this Court, was then and is now, as affiant believes and so states the fact to be, an officer of the State of California and a Senator thereof, and was then and still is in attendance to his duties as such in the city of Sacramento, the capital of the State, and by his oath as a representative there necessarily detained to fulfill his obligations; that affiant immediately notified him by telegraph of the coming up of this case; that said Goucher could not be in attendance on this Court as an attorney by reason of his official duty, and was therefore necessarily compelled to withdraw from this case. That as affiant is informed and believes the Hon. George Hearst, a United States Senator from California, has recently died, and that it was the duty of said Goucher to remain in the body that by law was to select a successor for said Senator Hearst. That had such a contingency not happened that in all probability the body of which Mr. Goucher was a member would have by operation of law fulfilled its work, and the said Goucher could have been discharged from his obligations and returned to Fresno and assisted in the preparation of the trial of this case, providing that the belief of affiant that the case would not be reached for trial until about the first of April, as aforementioned, was correct. That although this affiant knew that the people of the county of Fresno were to a greater or less extent feeling that many homicides had been committed, this affiant did not know or believe that the fact of the other homicide trials before this Court and this jury would result as they did, or that the people would feel that sufficient punishment might not be given to offenders. That affiant did not believe then that this defendant would not be enabled to secure a fair and impartial trial in this county. That affiant knew then that there was existing some bias and prejudice against this defendant, but did not believe that it was so widespread and universal as to prevent him having a fair and impartial trial. That had this case not been called for trial unexpectedly after the trial of J. D. Smith, and had affiant thought that he would not have had sufficient time to prepare and present a proper and lawful motion for a change of venue, this affiant would have made the proper preparation to present said motion before the first day of April, the time that affiant believed would be about the period this case would be called. That after the trials in said Court referred to affiant believes that the fact is now discovered to him that owing to the many violations of law lately committed in this county, and the conviction of defendants in the cases tried just prior to the calling of this case, and which convictions, as affiant is informed and believes, many people of this county think and feel should be of higher grades; affiant now believes, and on his information and belief, states that many of the citizens of this county are more prejudiced against this defendant than they were before; that affiant had no means of knowing what the result of said trials would be, and that they would result in awakening a bitter feeling against this defendant, as he verily believes they have done; that upon his being called suddenly into the trial of the cause of his client, and being, by reason of the absence of said expected assistant counsel, alone on the outset of this case, so unexpectedly set, he was physically unable to make the preparation for the trial of this defendant, and to make the proper and legal presentation of a motion to change the venue of this case, and to find and present the proper and legal evidence in support thereof; that all his time and energy was devoted to the proper preparing of his case upon the trial; that this was, to his mind, the best method to pursue at the time, fearing that physically he could not succeed in preparing a successful motion for a change of venue, and that his duty to his client demanded that he not take the risk of an overruling of his motion, and thus be forced to the trial of a serious issue in a murder case unprepared. This affidavit is made in the furtherance of exact justice: and, in support of the motion now made to this Court to continue this case, so that the defendant may properly comply with the provisions of Section 1034 of the Penal Code of this State, as it is the intention of this defendant to move this Court to grant him a change of venue in this cause.

S. R. HART.

Subscribed and sworn to before me this 17th day of March, A.D., 1891.

A. C. WILLIAMS,
Clerk.
By W. S. BADGER,
Deputy Clerk.

In rebuttal to the above affidavits,

F. H. Short,

Being duly sworn, testifies as follows:

I am special counsel for the People in this case; no one has raised any money in this county to employ me as special counsel in this case, nor has any one agreed to pay me for my services as such counsel. I am neither District Attorney nor Assistant District Attorney of this county.

Q. Have you been employed to assist the prosecution by any citizen of this State? A. Well——

Q. Are you under employment? A. I appear—yes, sir—for the prosecution.

Q. Under employment? A. Well, I think the only proper question at this time is as to whether I am employed by any citizen of the county. I simply go on the stand in answer to the defendant. I say I am not employed by any citizen of this county.

Mr. Tupper (District Attorney): I submit, if your Honor please, that this is not material to the issue joined.

Mr. Hogan (counsel for defendant): Well, if your Honor please, suppose this gentleman had volunteered his services in this case, isn't the defendant entitled to know that on the settlement of this motion?

Q. Have you volunteered in this case, Mr. Short?

Mr. Tupper: We think that is immaterial, irrelevant and incompetent.

The Court: I will sustain the objection to those questions.

Mr. Hart (counsel for defendant): We except.

Q. Have you any bias or prejudice in this case? A. I think not.

Q. Do you know whether you have or not? A. I have no bias or prejudice in the case.

Q. Have you any feeling in the matter as against this defendant? A. Not as against the defendant.

Q. As against the offense with which he is charged? A. I have some; yes, sir.

Q. Are you, in furtherance of that feeling, appearing here as assistant counsel for the prosecution? A. No, sir.

Q. I understand you to say you are not under employment in the case? A. I said I was not under employment by any citizen of Fresno County.

After hearing the aforesaid affidavits and testimony, and the argument of counsel, the Court denies the motion for a change of venue, and counsel for the defendant duly excepted.

(A)

At Fresno, April 11th, 1891—4 p. m.

Mr. H. H. Welsh, Assistant District Attorney, and S. R. Hart, one of counsel for defendant, being in Court, the following proceedings were had:

The Court: The People of the State of California *vs.* F. O. Vincent, convicted of murder in the first degree. F. O. Vincent, being present in Court, and also represented by his counsel, Mr. S. R. Hart, Mr. Clerk, you will let the minutes show this order. Let the minutes show that Friday, the 29th day of May, 1891, is fixed as the time for the execution of sentence of the defendant, F. O. Vincent; also let the minutes show that the warrant for the execution of said judgment, in which the time is so fixed, is handed in open Court to E. N. McCardle, a Deputy Sheriff of Fresno County. That is all.

Mr. Hart: To which order, if the Court please, we object, and desire to have our exception entered to the ruling, and to any of the proceedings that are now taken in this matter.

The Court: Just note that, Mr. Reporter.

(B)

That immediately following the rendition of which verdict, and immediately thereupon the following transpired:

Mr. Hogan: If your Honor please, I desire to state right now that at the time of the rendition of this verdict this community applauded the verdict of this jury, and to take an exception to it.

The Court: Let the exception be noted.

Within the time allowed by law, and the order of the Court, this bill of exceptions was prepared and presented for settlement in accordance with law.

The foregoing bill of exceptions is hereby settled and allowed, and is correct, this 23d day of May, A. D. 1891.

S. A. HOLMES,
Judge of Superior Court.

Clerk's Certificate.

State of California, } *ss.*
County of Fresno. }

I, A. C. Williams, County Clerk and ex officio Clerk of the Superior Court in and for the County of Fresno, State of California, do hereby certify that the foregoing printed pages contain a full, true, and correct copy of the judgment roll, composed of the following named papers, to wit: Information, Arraignment and Time to Plead, Plea, Statutory Time of Trial Waived by Defendant and Trial Set, Minutes of the Court Upon the Trial of the Cause, Instructions in the Case, Instructions Refused, Verdict of the Jury, Order Continuing Time for Passing Sentence, Motion for a New Trial, Order Denying Motion, and Judgment and Sentence of the Court in the case of the People of the State of California against F. O. Vincent, and also a true and correct copy of the Notice of Appeal and Bill of Exceptions in said action.

In witness whereof I have hereunto set my hand and affixed the seal of said Court, this 9th day of June, A. D. 1891.

[SEAL.]

A. C. WILLIAMS,
Clerk.
By W. S. BADGER,
Deputy Clerk.

Stipulation.

In the Supreme Court of the State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,
vs.
F. O. VINCENT, Defendant and Appellant.

It is hereby stipulated and agreed as follows:

I.

That the above entitled cause was brought to this Court upon an appeal taken by the defendant from a final judgment of conviction rendered in the above entitled cause in the Superior Court for the County of Fresno, State of California, on the 8th day of April, 1891, and also from an order made upon the same day in the same cause and by the same Court, denying said defendant's motion for a new trial therein.

II.

That upon the hearing of the appeal herein said defendant and appellant, in the briefs and upon the argument, made objection to the aforesaid verdict and judgment in the words and figures following:

"The judgment in this case is a violation of the Fourteenth Amendment of the Constitution of the United States, because the execution of said judgment would deprive appellant of life without due process of law.

"The alleged crime of murder, of which appellant stands convicted, was committed on the 18th day of December, 1890. On that day the only law which authorized the execution of a death sentence was Sections 1217 and 1229 of the Penal Code.

"On the 31st day of March, 1891, the Legislature passed a statute amending these provisions and repealing them. People *vs.* McNulty, 26 Pac. Rep. 597; 28 Pac. Rep. 816; 29 Pac. Rep. 61.

"In the case last cited this Court held that the Act of 1891 was *ex post facto* as to all crimes committed before its enactment. It was also therein held that Sections 1217 and 1229 of the Penal Code were repealed by the Act of 1891.

"There, therefore, now exists in this State no law authorizing the execution of the judgment in this cause, and there was no such law on the day the judgment appealed from was rendered.

"To execute the judgment in this case would not simply be depriving appellant of life without due process of law. It would be depriving him of life without any law at all.

"This is in the very teeth of the Fourteenth Amendment of the Constitution of the United States.

"Neither Section 1217 nor Section 1229 of the Penal Code is a 'law creating a criminal offense.'

"We respectfully submit that in the nature of things Section 329 of the Political Code cannot be made applicable to the facts in this case, and to make it applicable is violation of the provision of the Constitution of the United States against depriving a man of life without due process of law."

III.

That this stipulation be filed herein, and the same is hereby made a part of the record in this action, to be used on the hearing of the writ of error herein in the United States Supreme Court.

WM. H. H. HART, Attorney-General,
Attorney for Plaintiff and Respondent.
HENRY HOGAN,
GEORGE R. B. HAYES, and
CARROLL COOK,
Attorneys for Defendant and Appellant.

Filed February 24, 1893.

Filed July 25, 1892. Appeal from the Superior Court of Fresno County—S. A. Holmes, Judge. For Appellant, S. R. Hart and Henry Hogan. For Respondents, Attorney-General Hart and W. D. Tupper and F. H. Short.

Department Two.

THE PEOPLE, Respondents,
vs. } No. 20,852.
F. O. VINCENT, Appellant.

Appellant was convicted of the crime of murder in the first degree, and appeals from the judgment and from an order denying his motion for a new trial.

1. We see no errors in the rulings of the Court below in the matter of empaneling the jury.

It appears that the regular venire of jurors having been exhausted before the jury was completed, the Court ordered a special venire to be summoned by the Sheriff; that upon the return of the Sheriff the appellant interposed a challenge to the entire panel of jurors summoned upon said special venire, upon the ground of the bias and prejudice of the Deputy Sheriff who summoned them; and that said challenge was by the Court sustained. Appellant then interposed a challenge to the regular venire of jurors upon the ground that they had not been drawn in the manner as prescribed in Section 205, Code of Civil Procedure, and the Court also sustained that challenge. The Court then ordered a second special venire to be issued for one hundred jurors, and upon the return of the Sheriff it appeared that, of the one hundred jurors summoned, several were jurors who had also been upon the first special venire to which a challenge had been sustained for bias of the officer who summoned them. Appellant then interposed a challenge to the panel (of the second special venire) upon the ground that a part of the panel was composed of persons who were upon the first special venire, and for which the challenge for bias of the officer had been sustained as aforesaid; and upon the further ground (as we understand it) that because the drawing of regular jurors for the year was invalid, therefore there could be no valid order for the summoning of special jurors by the Sheriff. As to the first point, it is clear that the fact that a few persons summoned on the second venire had also been summoned on the first, furnished no basis for a challenge *to the panel.* It is not made a ground for such challenge by the statute. Penal Code, 1064. Whatever legal objections appellant may have had to those persons should have been presented as challenges to individual jurors. As to the second point, it was held in Levy *vs.* Wilson, 69 California, 111, and other cases, that the Court under Section 226, Code of Civil Procedure, may at any time direct the Sheriff to summon jurors from the body of the county, although there be names of properly selected regular jurors in the jury-box; and when from any cause there are no regular jurors to be drawn from, the very case arises where the Court may, without any doubt whatever, exercise the power granted by said Section 226.

2. We see no abuse of discretion in the overruling of appellant's motion for a change of venue. It is true that the prosecution filed no counter affidavits, except as to the employment of assistant counsel; but the only affidavits filed by the appellant on the motion were made by himself and his counsel, which fact distinguishes the case widely from People *vs.* Yoakum, 53 Cal., 566, upon which he relies. Moreover, as to the main point of public feeling against appellant in the county in which he was tried, the affidavits are largely upon information and belief, and upon that point, as the motion was not made until several days after the trial had commenced, the Court had witnessed the examination of a large number of jurors. The Code provides that "if the Court *be satisfied* that the representations of the appellant are true" the motion should be granted; and we certainly cannot say that in this case the Court ought to have been so satisfied. It is true that the discretion of a trial Court to grant or refuse a change of venue is not an arbitrary discretion—a mere naked irresponsible power; but when there has been fair room for the play of such discretion, and its exercise has not gone beyond legitimate and reasonable limits, it cannot be rightfully interfered with by the appellate Court. (People *vs.* Elliott, 80 Cal., 296, and cases there cited.) And we see no reason to hold that in the case at bar such discretion was improperly exercised.

3. It is contended by appellant that the Court erred in instructing the jury that "evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and for this purpose it must be received with great caution." This instruction and others stating the same principle have been frequently approved by this Court in murder cases. (People *vs.* Lewis, 36 Cal., 534; People *vs.* Williams. 43 *id.*, 344; People *vs.* Belencia, 21 *id.*, 544; People *vs.* King, 27 *id.*, 507; People *vs.* Ferris, 55 *id.*, 588; People *vs.* Jones, 63 *id.*, 168.) Appellant relies on the recent case of People *vs.* Phelan, III Cal. Decs., p. 51; 28 Pac. Rep., 855, in which the said instruction above quoted was held to be erroneous. But that was a case of *burglary*, in which the degrees of the crime are not based at all upon the principle which distinguishes the degrees of murder. Section 22 of the Penal Code provides that "whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any species *of degree* of crime, the jury make take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." Now, the degrees of murder are based upon the "intent" — the deliberation or premeditation — with which the act is done; and therefore it is not improper in trials for unlawful homicide to instruct the

jury that they can consider intoxication only for the purpose of determining the degree of the crime, because that is telling them in substance that they may consider it in determining "the purpose, motive, and intent" with which the act was committed. But in burglary the degrees of the crime are fixed solely by the point of *time* at which the act was done—if in the night-time, of the first degree; if in the day-time, of the second degree. Therefore, to tell a jury in a burglary case that they could consider intoxication only in determining the *degree* of the crime would be not only absurd, but to take away from them the right to consider it in determining the "purpose, motive, or intent" with which the accused did the act complained of. Burglary consists in entering a house (or one of certain other buildings mentioned in the Code), "with intent to commit grand or petit larceny, or any felony;" and it is apparent to the dullest apprehension that a drunken man might unlawfully enter a house without any intent whatever to commit larceny or felony. And it is equally apparent that a jury, in determining with what intent he entered, might well consider the fact that he was intoxicated; but the "degree" of the crime would have nothing to do with it. The Court, in delivering the decision in People *vs.* Phelan, did not consider it necessary to state that they were not dealing with a murder trial.

4. The crime of which appellant was convicted was committed prior to the Act of March 31, 1891, amending Sections 1217 and 1229 of the Penal Code, relating to the time and place for the execution of the death penalty; but it must be deemed to have been settled by the decision of this Court in bank in the case of the People *vs.* McNulty, 93 Cal., 427, that such amendments do not apply to convictions for offenses committed prior to their enactment.

The transcript does not contain the evidence, and the foregoing are the only grounds relied on for are versal. The record presents no error.

Judgment and order appealed from affirmed.

McFARLAND, J.

We concur:
DE HAVEN, J.
SHARPSTEIN, J.

Order.

In the Supreme Court of the State of California. In Bank. No. 20,852.

THE PEOPLE, ETC., Respondent, vs. F. O. VINCENT, Appellant. } On Appeal from the Superior Court of the County of Fresno.

Rehearing denied by the Court.

I, L. H. Brown, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an order made and entered in the above entitled cause, on the 24th day of August, A. D. 1892, as shown by the records of my office.

Witness my hand and the seal of the Court, this 6th day of February, A. D. 1893.

L. H. BROWN,
Clerk.

[SEAL]

By GEO. A. McCALVY,
Deputy Clerk.

August 25, 1892. Remittitur issued to the County Clerk of Fresno County.

January 17, 1893. Undertaking for costs approved.

January 19, 1893. Writ of error filed.

January 19, 1893. Citations from United States Supreme Court on writ of error.

[Copy.]

UNITED STATES OF AMERICA, SS.:

To the People of the State of California—Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of California, wherein F. O. Vincent is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Stephen J. Field, Associate Justice of the Supreme Court of the United States this fifth day of January, in the year of our Lord one thousand eight hundred and ninety-three.

(Signed:) STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

[Indorsed:] In the Supreme Court of the United States. F. O. Vincent, plaintiff in error, *vs.* The People of the State of California, defendant in error. Citation directed to the People of the State of California. Service of the within citation admitted this 18th day of January, 1893. Wm. H. H. Hart, Attorney-General of the State of California. Filed January 19, 1893, L. H. Brown, Clerk; by W. H. Govan, Deputy.

UNITED STATES OF AMERICA, SS.:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of California—Greeting:

[SEAL.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between F. O. Vincent, plaintiff in error, and the People of the State of California, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said F. O. Vincent, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fifth day of January, in the year of our Lord one thousand eight hundred and ninety-three.

(Signed:) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed to operate as a supersedeas.

(Signed:) STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

[Indorsed:] In the Supreme Court of the United States. F. O. Vincent, plaintiff in error, vs. The People of the State of California, defendant in error. Writ of Error directed to the Supreme Court of the State of California: Due service of the within writ of error and supersedeas and receipt of a true copy thereof is hereby admitted by the People of the State of California this 18th day of January, 1893, at Sacramento, California. Wm. H. H. Hart, Attorney-General of the State of California.

In the Supreme Court of the United States of America.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
F. O. VINCENT.
} 20,852.

Service of a certified copy of a writ of error issued out of the Supreme Court of the United States in this case and directed to the Justices of the Supreme Court of the State of California, which writ is allowed to act as a supersedeas, admitted by me this 21st day of January, A. D. 1893.

JAY SCOTT,
Sheriff of the County of Fresno, State of California.

By F. T. BERRY,
Under Sheriff.

[Indorsed:] Supreme Court of the United States. The People of the State of California *vs.* F. O. Vincent. Admission of service of copy of writ of error. Filed: January 24, 1893. L. H. Brown, Clerk, by Geo. A. McCalvy, Deputy.

Know all men by these Presents: That we, B. A. Chappel and G. W. Doughty, are firmly held and bound unto The People of the State of California in the full and just sum of five hundred dollars, to be paid to the said The People of the State of California; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seal and dated this 22d day of December, 1892.

Whereas, lately in a suit depending in the Supreme Court of the State of California, between F. O. Vincent and The People of the State of California, judgment was rendered against said F. O. Vincent, and the said F. O. Vincent being about to obtain a writ of error, and file and lodge a copy thereof, in the Clerk's office of said Supreme Court, to reverse the judgment in the aforesaid suit, and being about to issue a citation directed to The People of the State of California, citing and admonishing The People of the State of California to be and appear at the Supreme Court of the United States to be held at the City of Washington, in the District of Columbia, on the 18th day of February, A. D. 1893.

Now, the condition of the above obligation is such that if the said F. O. Vincent shall prosecute his writ of error to effect and answer all damages and costs, then the above obligation to be void, else to remain in full force and virtue.

(Signed:) B. A. CHAPPEL.
(Signed:) G. W. DOUGHTY.

STATE OF CALIFORNIA, } *ss.*
County of Napa. }

B. A. Chappel and G. W. Doughty, sureties above named, being duly sworn, each deposes and says for himself personally, that he is a householder and resident within the State of California, and that he is worth the sum of five hundred dollars over and above his debts and liabilities exclusive of property exempt from execution.

(Signed:) B. A. CHAPPEL.
(Signed:) G. A. DOUGHTY.

Subscribed and sworn to before me, this 22d day of December, A. D 1892.

HENRY HOGAN,
Notary Public in and for the County of Napa, State of California.

The above bond, both as to the form, sufficiency of sureties, and amount, is hereby approved this 5th day of January, A. D. 1893, and of the independence of the United States the 117th.

(Signed:) STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

[Indorsed:] In the Supreme Court of the United States: F. O. Vincent, plaintiff in error, vs. The People of the State of California, defendant in error.

Undertaking for costs.

Assignment of Errors.

United States of America: Supreme Court of the United States, October term, 1892.

F. O. VINCENT, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Defendant in Error.
} Assignment of Errors.

On the sixth day of March, in this same term before the Justices of the Supreme Court of the United States, at the City of Washington, comes the said F. O. Vincent, by his attorneys, and says that in the record and proceedings aforesaid, there is manifest error in this, to wit:

First—For that the Supreme Court of the State of California erred in adjudging that the execution of the judgment rendered by the Superior Court of the County of Fresno, State of California, on the 8th day of April, 1891, would not be to deprive plaintiff in error of life without due process of law.

Second—For that the said Supreme Court of the State of California erred in adjudging that the plaintiff in error might be executed under Sections 1217, 1227 and 1229 of the Penal Code of the State of California, as the same stood prior to the amendment of the 31st day of March, 1891.

Third—For that the Supreme Court of the State of California erred in adjudging that Section 329 of the Political Code kept alive the original provisions of Sections 1217, 1227 and 1229 of the Penal Code for the purpose, among other things, of executing the aforesaid judgment of the aforesaid Superior Court.

Fourth—For that the said Supreme Court of the State of California should have discharged the plaintiff in error and released him from custody because the enforcement of the aforesaid judgment would be repugnant to the provisions of the Constitution and particularly to the fourteenth amendment thereto, and to that provision of said amendment which forbids the deprival of the plaintiff in error of his life without due process of law.

And the said F. O. Vincent prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he has lost by reason of said judgment.

F. O. VINCENT,
Plaintiff in Error.

By HENRY HOGAN,
GEORGE R. B. HAYES, and
CARROLL COOK,
His Attorneys.

[Indorsed:] Filed in the Supreme Court of the State of California, February 24, 1893.

I, L. H. Brown, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing 55 printed pages, numbered from 1 to 55, inclusive, are a full, true, and correct copy of the record, and of all proceedings in the above and therein entitled action, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said Court, this 14th day of March, 1893.

L. H. Brown

[SEAL.] Clerk of the Supreme Court of the State of California.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

F. O. VINCENT, Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief in Support of Motion to Dismiss, and in Support of Motion to Affirm.

In this case the defendant in error has made a motion to affirm, united with a motion to dismiss, for want of jurisdiction.

1. The plaintiff in error was convicted of murder, and sentenced to be hanged in the county of Fresno, in accordance with the statute of California then in force, requiring that execution for a capital offense should be by the Sheriff of the county, and in the county jail (Record, pp. 25 and 26), as the law of the State then provided (Record p. 51).

Subsequently, and after this cause had been appealed to the Supreme Court of California, and before a decision in that Court, a law was passed in that State directing that executions for capital offenses should be by the Warden of the State Prison, and in the State Prison. (Record, p. 51.)

The judgment of the Supreme Court of California, affirming the judgment commanding the execution of the plaintiff in error, was made on the ground that the law which was in force at the time he was convicted and sentenced to be executed remained in force as to offenses committed thereunder, and the Court came to this conclusion, in view of the provisions of Section 329 of the Political Code of California, which the Court regarded as a saving clause. That section reads as follows:

> "The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment, information, or punishment is expressly declared in the repealing Act."

The opinion of the Court affirming the judgment is printed in the record in this cause, pp. 49–51, and is reported in Volume 95 of the California Reports, p. 425.

Thus it will be seen that the decision of that Court, which the plaintiff in error seeks to have here reviewed, related entirely to the question whether a certain statute of that State had been repealed, and not to any Federal question.

In the brief for plaintiff in error, filed in the McNulty case in this Court, there are general statements, from which counsel would have it understood that in rendering the judgment the State Supreme Court decided in respect to the validity of statutes of that State under the Constitution of the United States; but the brief does not point out what particular question is thus decided, nor under what particular provision of the laws of Congress it is claimed this Court has jurisdiction in this case.

In these general statements in the brief, counsel has included an opinion of that Court which has been set aside, and the opinion dissenting therefrom by a minority of the Court, but has not specified what Federal question he claims was decided in making the decision and judgment which is now in force, and which is the only one to be considered. This decision is that which is contained in the record, pp. 111–119 in the McNulty case, to be argued with this, in which it was held, as above explained, that there existed a section in the California Statutes (said Section 329 of the Political Code), which continued statutes in force for the punishment of offenses committed under those statutes; and it appears from this opinion that there was nothing decided in relation to the constitutionality of any law, nor any Federal question whatever decided; but simply that one California statute had not been repealed by another, as to offenses committed under the former, and placing the decision upon the ground that there existed a section in the California Statutes in the nature of a saving clause in respect to offenses previously committed, being a question only for the State Court to determine, and not reviewable in this Court.

Neither would the plaintiff in error be in any better position had the first decision made by that Court been permitted to stand. That opinion is published in the record, pp. 70–91, of the McNulty case, and was to the effect that the last law, and which is termed in the brief for the plaintiff in error in that case, p. 4, the "new law," was unconstitutional, and, consequently, did not repeal the law under which the plaintiff in error had been tried, convicted, and sentenced. That decision resulted likewise in an affirmance of the judgment against McNulty.

That decision, also, had it not been set aside, was not reviewable in this Court, the law of Congress being that it is only where a State Court has decided IN FAVOR OF THE VALIDITY of a State statute, where its validity is drawn in question as being repugnant to the Constitution of the United States, that this Court has jurisdiction to review the decision. (U. S. Rev. Stats., Sec. 709). But that decision was against the validity of the new law.

There was no question made at any time in this case against the validity of the law under which McNulty committed the offense and was tried and sentenced, but the only question was whether that law had been repealed by this later law, and in the first opinion of the California Supreme Court, printed in the record, pp. 70–91, it was held that the old law had not been repealed by the new law, which was decided to be unconstitutional.

Afterwards, in that case a rehearing was granted (Record, p. 111), and again that Court held that the old law had not been repealed as to offenses committed under it, and thus held because of the saving clause in that section (329). Under both of these opinions the result was the same;

that is, that he should be executed under the old law—the law in force at the time he committed the offense charged—and in the place, mode, and manner, as it would have been if the new law had not been passed.

In the brief of the plaintiff in error, p. 8, in the McNulty case, is the following:

"In this case, our first claim on behalf of the plaintiff in error is, that having been convicted of the crime, to wit: murder in the first degree, before the present law relative to executions became a law, he cannot legally or constitutionally be executed under it."

This observation is entirely foreign to the case. As above explained, the judgment is not that the plaintiff be executed under the new law, but that he be executed according to the law in existence at the time of the commission of the offense of which he was accused and found guilty.

This case is unlike that of *ex parte Medlay*, reported in 134 U. S. 160. There Medlay was sentenced to be executed under a law which was enacted after he had committed the offense, and it was held by this honorable Court that the law under which he was thus sentenced inflicted a greater punishment than that under which the offense was committed, and was, therefore, in its nature *ex post facto* within the meaning of Section 10, Article I, of the Constitution of the United States.

In this case, the plaintiff in error has not been sentenced under a law enacted after the offense was committed, but under the same law which was then in force, the Court holding that said Section 329 continued the former law in force for the punishment of offenses committed thereunder.

Therefore, the proposition attempted to be presented to this Court by the assignment of errors (Record, p. 55 of this case), that to execute the plaintiff in error under a law passed after he committed the offense would be in violation of Section 10, Article I, of the Constitution of the United States, declaring that no State shall pass any bill of attainder or *ex post facto* law, has no application to this case, as the judgment does not direct his execution in the State Prison, or by the Warden of the State Prison, or at all in accordance with the new law, but by the Sheriff of the county, and in the county jail, under the law existing and as it existed at the time of the commission of the offense. (Record, pp. 49–51.)

Whether, under a proper construction of the statutes of California, the law in force at the time the offense was committed was wholly repealed by the subsequent law, or was continued in force as to offenses committed thereunder by that section (329) of the Political Code, is a question solely for the State Courts to determine, and not a question of which this Court has jurisdiction.

As the Supreme Court of California decided that the plaintiff in error should be executed in the manner prescribed by the law in existence when he committed the offense (Record, p. 51), it is not material to inquire whether the subsequent law increased the punishment for a capital offense.

The State Court, by its judgment, has not attempted to enforce against the plaintiff in error an *ex post facto* law, and there cannot, therefore, be any question in this case concerning a law of that nature.

2. Neither would the execution of the plaintiff in error, in obedience to the judgment of the State Court, be depriving him of life without due process of law.

In the opinion in *Hurtado* vs. *California*, 110 U. S. 516, there is a very full exposition of the meaning of the words "due process of law."

The following is from page 527 of that opinion:

"Mr. Reeve, in 2 History of Eng. Law, 43, translates the phrase *nisi per legale judicium parium suorum vel per legem terræ:* 'But by the judgment of his peers, or by some other legal process or proceeding adapted by the law to the nature of the case.'

"Chancellor Kent, 2 Com. 13, adopts this mode of construing the phrase. Quoting the language of Magna Charta, and referring to Lord Coke's comment upon it, he says: 'The better and larger definition of due process of law is that it means law in its regular course of administration through Courts of justice.'

"This accords with what is said in *Westervelt* vs. *Gregg*, 12 N. Y. 202, by Denio, J., p. 212: 'The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government.'"

On page 534 of that opinion is given an extract from the opinion by Justice Miller, in *Davidson* vs. *New Orleans*, 96 U. S. 105, reading as follows:

"It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has by the laws of the State a fair trial in a Court of justice, according to the modes of proceeding applicable to such a case."

The following is from pages 535, 536 of 110 U. S.:

"Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation."

Tested by these definitions of what is due process of law, the execution of the plaintiff in error would be by such process.

He has been convicted and sentenced in the regular course of administration of law in Courts of justice, after a trial according to the usual mode of proceeding applicable to such a case.

In the assignment of errors or stipulation it is asserted (page 48 of the record) that the statutes under which the plaintiff in error was accused, tried, convicted, and sentenced to be hanged, were absolutely and completely repealed without any saving clause.

The Supreme Court of California decided otherwise (Record, p. 51), and there is no complaint that the plaintiff in error did not have an opportunity to have his case duly presented to that Court, and the enforcement of the judgment thus given would be due process of law.

The plaintiff in error cannot, in this Court, controvert the correctness of the judgment of the Supreme Court of California as to the construction given by that Court to the California statutes in holding that the statute under which he was prosecuted, convicted, and sentenced has not been repealed as to offenses committed under it, such decision not being upon a Federal question.

The question whether a statute of a State has been repealed by a subsequent statute, is purely a question for the cognizance of the State Court, and not a question of which this Court has jurisdiction.

The following is from the opinion in *Blount* vs. *Walker*, 134 U. S. 614:

"To give this Court jurisdiction of a writ of error to a State Court, it must appear affirmatively, not only that a Federal question was presented for decision to the highest Court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. (*New Orleans Waterworks Company* vs. *Louisiana Sugar Refining Company*, 125 U. S. 18, 29; *Klinger* vs. *Missouri*, 13 Wall. 227, 263; *Desaussure* vs. *Gaillard*, 127 U. S. 216; *Hopkins* vs. *McLure*, 133 U. S. 380.)"

3. Assignment of errors of record are as follows:

First—For that the Supreme Court of the State of California erred in adjudging that the execution of the judgment rendered by the Superior Court of the county of Fresno, State of California, on the eighth day of April, 1891, would not be to deprive plaintiff in error of life without due process of law.

Second—For that said Supreme Court of the State of California erred in adjudging that the plaintiff in error might be executed under Sections 1217, 1227, and 1229 of the Penal Code of the State of California, as the same stood prior to the amendment of the thirty-first day of March, 1891.

Third—For that the Supreme Court of the State of California erred in adjudging that Section 329 of the Political Code kept alive the original provisions of Sections 1217, 1227, and 1229 of the Penal Code, for the purpose, among other things, of executing the aforesaid judgment of the aforesaid Superior Court.

Fourth—For that the said Supreme Court of the State of California should have discharged the plaintiff in error and released him from custody, because the enforcement of the aforesaid judgment would be repugnant to the provisions of the Constitution, and particularly to the Fourteenth Amendment thereto, and to that provision of said amendment which forbids the deprival of the plaintiff in error of his life without due process of law.

There is no merit in any of these, for the following reasons:

First—No such point was made or decided in the State Court, and if made was not involved in that Court or the case on the record therein made.

Second—The first, second, and third assignments of error raise no Federal question or point other than State practice.

Third—None of the points made in the stipulation of points involved (Record, p 48) raises a Federal question.

To be reviewable in this Court, the right, privilege, or immunity must have been set up or claimed at the proper time in the proper way in the

State Supreme Court, and the decision must be against the right so set up or claimed.

Spies vs. *Illinois*, 123 U. S. 181.

Fourth—It does not appear from the record that there was not a legal examination and commitment or proper trial.

Under the Penal Code of California, to raise the question in the Supreme Court that there had not been an examination and commitment preliminary to the filing of an information, it would be necessary to present the question by motion in the trial Court, and, on the denial of the motion, to incorporate the same, accompanied by a statement that there had not been an examination and commitment, in a bill of exceptions, so as to have the same appear in the record, otherwise it would not appear in the record before the Supreme Court whether there had or had not been an examination and commitment, as the papers showing the examination and commitment do not, under the statutes of California, constitute any part of the usual record. The following is from the Penal Code:

"SEC. 1207. When judgment upon a conviction is rendered, the Clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had, and the fact of a prior conviction, if one, and must, within five days, annex together and file the following papers, which will constitute a record of the action:

"1. The indictment or information, and a copy of the minutes of the plea or demurrer;

"2. A copy of the minutes of the trial;

"3. The charges given or refused, and the indorsement thereon; and,

"4. A copy of the judgment."

Section 1246 of the Penal Code directs what shall be transmitted to the Supreme Court of the State on appeal in a criminal case, as follows:

"SEC. 1246. Upon an appeal being taken, the Clerk with whom the notice of appeal is filed, must, within ten days thereafter, in case the bill of exceptions has been settled by the Judge before the giving of said notice, but if not, then within ten days from the settlement of the bill of exceptions, without charge, transmit to the Clerk of the appellate Court a copy of the notice of appeal, and of the record, and of all bills of exceptions, instructions, and indorsements thereon; and, upon the receipt thereof, the Clerk of the appellate Court must file the same and perform the same services as in civil cases, without charge."

In the record in this case, no bill of exceptions appears to show that the plaintiff in error was not examined and committed, or that any point was made in the State Court in that regard.

It is decided in *Hurtado* vs. *People of California*, 110 U. S. 516, that the words "due process of law," in the Fourteenth Amendment of the Constitution of the United States, do not necessarily require an indictment by grand jury in a prosecution by a State for murder.

It is respectfully submitted that the motion to dismiss the writ of error should be sustained.

If, however, a Federal question was or is involved, and if this Court on the record has jurisdiction, then I submit the judgment of the State Court should be affirmed, because the writ of error was taken for delay and not because of sufficient grounds.

WM. H. H. HART,
Attorney-General of the State of California,
Attorney for the Defendant in Error.

Case No 15286

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

October Term, 1892

Term No 1316.

F. O. VINCENT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, DEFE
IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIF

Filed March 30, 1893.

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WM. H. H. HART,
Attorney-General of the State of California,
Attorney for the Defendant in Error.

149 US 648

Case No. 15,286

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

October Term, 1892

Term No 13 16.

F. O. VINCENT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Filed March 30, 1893.

SUPREME COURT OF THE UNITED STATES.

.... *Term, 189*....

F. O. VINCENT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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SACRAMENTO: : : STATE PRINTING OFFICE, 1893.

In the Superior Court in and for the County of Fresno, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
F. O. VINCENT.
} Information for Murder.

F. O. Vincent is accused by the District Attorney for the County of Fresno, State of California, by this information, of the crime of murder, committed as follows:

The said F. O. Vincent, on or about the 18th day of December, eighteen hundred and ninety, at and in the said county of Fresno, and State of California, and prior to the filing of this information, did willfully, unlawfully, feloniously, and with malice aforethought, shoot, kill, and murder Anna L. Vincent, a human being, contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the State of California.

W. D. TUPPER,
District Attorney of the County of Fresno, State of California.

[Indorsed:] No. 651. The People of the State of California *vs.* F. O. Vincent. Information for murder. Filed in the Superior Court of the County of Fresno, State of California, by the District Attorney of said county, this 31st day of December, 1890. A. C. Williams, Clerk. By W. S. Badger, Deputy Clerk. W. D. Tupper, District Attorney.

Arraignment and Time to Plead.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., January 7, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; George Moore, Deputy Sheriff; L. R. Williams, Deputy Clerk.

THE PEOPLE, ETC.,
vs.
F. O. VINCENT.
} Arraignment and Time to Plead.

The District Attorney, with the defendant and his counsel, S. R. Hart, came into Court for the purpose of arraignment, and the Information is read to the defendant charging him with the crime of murder, and a true copy thereof delivered to him by the Clerk. Defendant states that the name by which he is charged is his true name; and being asked whether he is guilty or not guilty, asks, and is given, till Saturday, the 10th inst., at 10 o'clock A. M. of said day, in which to plead to said Information.

Plea.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., January 10, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk.

THE PEOPLE, ETC., vs. F. O. VINCENT. } Plea.

And now at this day comes the defendant and his counsel, S. R. Hart, and the District Attorney being present in Court, and this being the day and hour heretofore fixed for defendant to plead to the Information filed against him, who, being asked to state his plea, orally pleads "Not Guilty," of the offense charged in said Information.

Statutory Time Waived, and Trial Set.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., February 5, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE, ETC., vs. F. O. VINCENT. } Statutory Time Waived, and Trial Set.

Now comes the defendant by his counsel, S. R. Hart, and waives the statutory time of trial herein, and it is ordered that the time of the trial in this case be, and the same is hereby fixed, for Monday, the 2d day of March, 1891, at 10 o'clock A. M.

Minutes of the Court.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 11, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; E. M. McArdle, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA against F. O. VINCENT. } Trial of Cause, First Day.

This cause came on regularly for trial upon an Information filed herein, charging the defendant with the crime of murder.

W. D. Tupper, District Attorney, and F. H. Short, associate counsel, appear on the part of the People, and S. R. Hart for the defendant, the defendant being present in Court. All parties announce that they are ready to proceed with the trial of the cause.

Proceedings were regularly had to empanel a jury, pending which the regular venire became exhausted, and the Court ordered that a special venire issue herein for seventy-five good and lawful citizens to serve as jurors in this action, and that they be summoned to be and appear in this Court on Friday, the 13th inst., at 9 o'clock A. M.

And it is ordered that an adjournment of the case be had till said last named day and hour.

In the Superior Court of the County of Fresno, State of California.

FRESNO, March 13, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
F. O. VINCENT.
} Trial of Cause, Second Day.

The trial of this cause is resumed, pursuant to adjournment had herein on Wednesday.

W. D. Tupper, District Attorney, and H. H. Welsh and F. H. Short, associate counsel for the People, with the defendant and his counsel, S. R. Hart, are present in Court.

On motion of S. R. Hart, Henry Hogan, Esq., is entered as associate counsel for the defendant herein.

The Sheriff having returned the special venire of jurors issued herein on Wednesday, the names of whom appear regularly entered in the jury book of this Court, to which reference is hereby made.

The defendant, by his counsel, interposes a challenge to the entire panel of jurors summoned upon said special venire, upon the ground of the bias and prejudice of one of the officers who summoned said jurors. Said motion is resisted by the District Attorney, and J. C. Collyer, Under Sheriff, is sworn, and testifies in this behalf, and said matter is submitted to the Court, and the Court, after duly considering thereof, orders that said challenge be, and the same is hereby allowed, and said special venire of jurors is discharged.

Defendant now, by his counsel, interposes a challenge to the regular venire of jurors in attendance herein, upon the ground that said venire of jurors was not drawn as prescribed by Section 205 of the Code of Civil Procedure of the State of California. The District Attorney announces that, without admitting the facts alleged, he will not resist said challenge, and said matter is submitted without argument; and the Court, after duly considering thereof, allows said challenge, and the remainder of said regular venire in attendance at this time are excused from further attendance upon the trial of this cause, and the Court orders that another special venire issue herein for 100 good and lawful citizens to serve as jurors in this action, and that they be summoned to be and appear in this Court on Saturday, the 14th inst., at 10 o'clock A. M. of said day.

And it is ordered that an adjournment of the case be had till said last named day and hour.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 14, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
F. O. VINCENT.
} Trial of Cause, Third Day.

The trial of this cause is resumed, pursuant to adjournment had herein on yesterday.

W. D. Tupper, District Attorney, and F. H. Short and H. H. Welsh, associate counsel for the People, with the defendant and his counsel, S. R. Hart and Henry Hogan, are present in Court.

The Sheriff having returned the second special venire of jurors issued herein on yesterday, consisting of the following-named persons, to wit:

A. W. Calkins, T. J. Pritchard, L. D. Cook, Byron Van Valkenburg, John Garmen, Peter Skivington, J. C. Holly, Milton Brayman, W. M. Story, C. J. Smith, A. Dilley, T. W. Ray, J. E. Pollard, J. J. Elwell, E. T. Woolfolk, J. W. Wilkins, E. M. Russell, A. D. Jones, H. E. Nudd, W. Buchanan, W. F. Plate, M. B. Garney, W. S. Hopkins, A. A. Hoffman, Chas. Erickson, L. L. Boone, M. Martin, R. M. Crow, W. C. Hagan, D. Dismukes, L. P. Clark, T. B. Sneden, T. D. Reed, H. Larsen, T. W. Fresh, S. B. Holton, Chas. Moore, W. N. Lee, W. H. Schrop, C. G. Anderson, D. H. Babby, W. P. Maze, J. L. Wynn, W. J. Miller, L. A. Carson, David Qualls, Frank Trangaza, E. E. Lott, E. Stack, J. F. Hill, C. C. Baer, A. F. Dickey, Frank Lawton, J. P. Wekleman, W. B. Hazelton, W. E. Farwood, W. R. Wood, F. R. Lindsey, A. Vandement, M. L. Dean, Amos Young, Milton Day, Charley Hopper, J. S. Filloon, H. P. Holmes, M. Groth, N. P. Hansen, A. Adelsback, Jens Hansen, L. Seeberg, A. Eastabrook, C. S. Paulsen, W. B. Wilson, S. M. Woft, H. Madsen, Edward Arbaugh, M. M. Parsons, George Cowser, August Young, Frank Manderville, J. Sunmer, John Cobby, Marshall Lee, Thomas Musick, W. W. Machen, F. Berry, C. Henry, A. Ward, Alex. Barringer, Bob Staley, C. J. Berry, C. R. Woods, T. E. Ball, D. Bruce, Fred. Burleigh, H. S. Williams, Willard McGuire, Geo. Smith, J. V. Curd, and Joe Wilkison.

The defendant by his counsel interposes a challenge to the entire panel of jurors summoned upon said second special venire herein, upon the ground that a part of said panel is composed of veniremen who were upon the first special venire herein, and who were on yesterday excused upon the ground that they were summoned by a biased officer. Said challenge is resisted by the District Attorney, and after hearing evidence and arguments of counsel, said matter is submitted to the Court for decision, and after duly considering thereof, and being fully advised in the premises, the Court denies said challenge and orders that the trial of the cause proceed. To which ruling of the Court defendant by his counsel excepts.

Proceedings are resumed to empanel a jury, and the jury box is filled, at which time the defendant by his counsel interposes a challenge to the panel, upon the ground that the ballots containing the names of the jurors were not prepared by the clerk in the presence of the Court. Said challenge is resisted by the District Attorney, and W. S. Badger, a deputy clerk, is sworn and testifies in this behalf, and the matter is submitted without argument, and the Court, after duly considering thereof, and being fully advised in the premises, denies said challenge, and orders that the trial proceed, to which ruling of the Court defendant by his counsel excepts, and the proceedings to empanel a jury are resumed, pending which the Court ordered an adjournment of the case till 2 o'clock P. M. of this day.

The Court reconvened at 2 P. M., when counsel for the People, with the defendant and his counsel, are present in Court.

Proceedings were resumed to empanel a jury, pending which the Court ordered an adjournment of the case till Monday, the 16th inst., at 10 o'clock A. M. of said day.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 16, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
F. O. VINCENT.
} Trial of Cause, Fourth Day.

The trial of this cause is resumed pursuant to adjournment had herein on Saturday.

W. D. Tupper, District Attorney, and F. H. Short, associate counsel for the People, with the defendant and his counsel, S. R. Hart and Henry Hogan, are present in Court.

Proceedings were resumed to empanel a jury, pending which the Court ordered an adjournment of the case till 2 o'clock P. M. of this day.

The Court reconvened at 2 P. M., when counsel for the People, with the defendant and his counsel, are present in Court.

Proceedings to empanel a jury are resumed, pending which the Court ordered an adjournment of the case till to-morrow, the 17th inst., at 9 o'clock A. M.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 17, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk: J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
F. O. VINCENT.
} Trial of Cause, Fifth Day.

The trial of this cause is resumed pursuant to adjournment had herein on yesterday.

W. D. Tupper, District Attorney, and F. H. Short and H. H. Welsh, associate counsel for the People, with the defendant and his counsel, S. R. Hart and Henry Hogan, are present in Court.

The defendant, by his counsel, moves the Court for a change of place of trial to another Court of the State of California, in and for some other county of said State, other than the county of Fresno, upon the grounds that the defendant herein cannot have a fair and impartial trial within this the county of Fresno. The affidavits of said defendant, F. O. Vincent, and of S. R. Hart and Henry Hogan are introduced and read in support of said motion, which is resisted by counsel for the People, and F. H. Short is sworn and testifies in this behalf, and after argument said motion is submitted to the Court for decision, and after duly considering thereof and being fully advised in the premises, the Court denies said motion and orders that the trial of the case proceed, to which ruling of the Court, defendant, by his counsel, excepts.

Proceedings were resumed to empanel a jury, and H. P. Holmes, J. J. Elwell, A. D. Jones, H. L. Nudd, E. M. Russell, and W. Buchanan having been examined on their *voir dire* and accepted by the respective parties, are sworn to try the cause, and the Court orders an adjournment of the case till 2 o'clock P. M. of this day; and the jurors accepted and sworn to try the cause are placed in charge of Deputy Sheriff George Moore, who is duly sworn according to law.

The Court reconvened at 2 o'clock P. M., when counsel for the People, with the defendant and his counsel, are present in Court, and the jurors accepted and sworn are in their seats.

Proceedings to empanel a jury are resumed, and John Cobby, W. W. Machen, J. E. Pollard, and Byron Van Valkenburg, having been examined on their *voir dire* and accepted by the respective parties, are sworn to try the cause, and the venire is exhausted, and the Court orders that another special venire issue herein for forty good and lawful citizens to serve as jurors in this action, and that they be summoned to be and appear in this Court on to-morrow, the 18th instant, at 2 o'clock P. M.

On application of counsel for the defendant, it is ordered that the reporter transcribe his shorthand notes of the testimony of the jurors accepted and sworn to try the cause.

And the Court orders an adjournment of the case till to-morrow, the 18th instant, at 2 o'clock P. M., and the jurors accepted and sworn to try the cause are placed in charge of Deputy Sheriff Geo. Moore, who is duly sworn according to law.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 18, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
F. O. VINCENT.
} Trial of Cause, Sixth Day.

The trial of this cause is resumed pursuant to adjournment had herein on yesterday.

W. D. Tupper, District Attorney, and F. H. Short, associate counsel for the People, with the defendant and his counsel, S. R. Hart and Henry Hogan, are present in Court, and the jurors accepted and sworn are in their seats. The Sheriff having returned the third special venire issued herein on yesterday, consisting of the following-named persons, to wit:

A. Melvin, A. J. Macy, J. F. Coney, A. C. Morton, J. H. Wagoner, M. Dodge, John McGarry, William Britner, S. W. Johnson, E. W. Gould, R. Docekel, Henry Donahoo, Thomas Bradford, M. Russell, Ray White, Jacob Weaver, Charley Easton, W. F. Ensign, C. R. McClahan, C. F. Ellis, J. B. Reybuna, Thomas Ponton, B. Richardson, Charles Clark, P. M. Hart, S. P. Conger, T. W. Cobby, J. M. Rose, W. D. Wristen, William Hamilton, C. C. Puryear, J. C. C. Russell, J. W. Rogers, D. Watson, Charles Mutchlar, James Simmons, C. A. Stevens, S. R. Morrison, H. T. Unger, and W. S. Lane.

The defendant, by his counsel, interposes a challenge to the entire panel of jurors summoned upon said third special venire herein, upon the ground of the bias of the officer who summoned them. Said challenge is resisted by the District Attorney, and is submitted to the Court without argument, and after duly considering thereof, and being duly advised in the premises, the Court denies said challenge, and orders that the trial proceed, to which ruling of the Court the defendant, by his counsel, excepts.

Proceedings to empanel a jury are resumed, and the jury box is filled, at which time defendant, by his counsel, interposes a challenge to the panel, upon the ground that the ballots containing the names of the jurors were not prepared by the Clerk in the presence of the Court. Said challenge is resisted by the District Attorney, and W. S. Badger, a Deputy Clerk, is sworn, and testifies in this behalf, and the matter is submitted without argument, and the Court, after duly considering thereof, and being fully advised in the premises, denies said challenge, and orders that the trial proceed, to which ruling of the Court the defendant, by his counsel, excepts.

The proceedings to empanel a jury are resumed, and John McGarry and Charles Clark having been examined on their *voir dire* and accepted by the respective parties, are sworn to try the cause, and the jury is complete.

And the Court orders an adjournment of the case till to-morrow, the 19th instant, at 9 o'clock A. M. of said day.

And the jury is placed in charge of Deputy Sheriff George Moore, who is duly sworn, according to law.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 19, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
F. O. VINCENT.
} Trial of Cause, Seventh Day.

The trial of this cause is resumed pursuant to adjournment had herein on yesterday.

W. D. Tupper, District Attorney, and F. H. Short, associate counsel for the People, with the defendant and his counsel, S. R. Hart and Henry Hogan, are present in Court, and the jury in their seats.

The Information is read, and the plea of not guilty of the defendant is stated to the jury by the Clerk.

The defendant, by his counsel, objects to proceeding with the trial of this case to any further extent, upon the ground that the panels from which the jury was drawn have been illegally drawn, for the reasons stated in the previous motions made in this Court, which are a part of the record. Said objection is submitted without argument, and by the Court overruled, to which ruling the defendant, by his counsel, excepts.

It is ordered that the reporter transcribe his shorthand notes of the testimony herein, and furnish a copy thereof to each counsel for the People and the defendant.

After a statement of the case by W. D. Tupper, District Attorney, Mrs. H. I. Rogers and Mrs. A. J. Redd are sworn and testify on the part of the People, and the Court orders an adjournment of the case till 1:30 P. M. of this day.

And the jury is placed in charge of Deputy Sheriff Geo. Moore, who is duly sworn, according to law.

The Court reconvened at 1:30 P. M., when counsel for the People, with the defendant and his counsel, are present in Court, and the jury in their seats.

Mrs. A. J. Redd and Mrs. H. I. Rogers are recalled for further cross-examination, and J. E. Ragsdale, D. R. Prince, J. G. Johnston, O. M. Thompson, C. Hershey, F. M. Curran, A. H. Jameson, C. S. Swain, Marion Childers, and Dr. W. T. Maupin are sworn, and testify on the part of the People, and the Court orders an adjournment of the case till to-morrow, the 20th instant, at 9 o'clock A. M.

And the jury is placed in charge of Deputy Sheriff Geo. Moore, who is duly sworn, according to law.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 20, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
F. O. VINCENT.
} Trial of Cause, Eighth Day.

The trial of this cause is resumed pursuant to adjournment had herein on yesterday.

W. D. Tupper, District Attorney, and F. H. Short, associate counsel for the People, with the defendant and his counsel, S. R. Hart and Henry Hogan, are present in Court and the jury in their seats.

The District Attorney announces that the People rest their case, and after a statement of the case to the jury by Henry Hogan, Esq., Dr. H. N. Rucker, Samuel Ralston, John Graupman, Fred. Grimmer, A. Wolters, Henry Wehner, E. T. Houston, Gus. Lamond, and Dr. F. M. Sponogle are sworn, and testify on the part of the defendant, and the Court orders an adjournment of the case till 2 o'clock P. M of this day.

And the jury is placed in charge of Deputy Sheriff Geo. Moore, who is duly sworn according to law.

The Court reconvened at 2 o'clock P. M., when counsel for the People, with the defendant and his counsel, are present in Court and the jury in their seats.

The taking of testimony is resumed, and Nick Justy, J. E. Williams, Robert Brown, A. H. Kuhlman, W. P. Miller, P. B. Chambers, M. Murray, John Morse, Wm. Sparks, Jas. Graham, Wm. Shields, J. A. Barker, Jno. M. Ryan, L. C. Smith, Chas. Swain, W. R. Williams, Henry Roemer, Chas. W. Gearhart, Geo. Moore, Albert Storey, H. Bedford, N. L. F. Bachman, H. O. Buker, Chris. Hartsough, W. A. Bigby, Dr. H. St. George Hopkins, M. A. Blade, Jos. Spinney, and Mrs. Ellen Chapell are sworn. and testify on the part of the defendant, pending which testimony of the last named witness the Court ordered an adjournment of the case till to-morrow, the 21st inst., at 9 o'clock A. M.

And the jury is placed in charge of Deputy Sheriff Geo. Moore, who is duly sworn according to law.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 21, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA *against* F. O. VINCENT. } Trial of Cause, Ninth Day.

The trial of this cause is resumed pursuant to adjournment had herein on yesterday.

W. D. Tupper, District Attorney, and F. H. Short, associate counsel for the People, with the defendant and his counsel, S. R. Hart and Henry Hogan, are present in Court, and the jury in their seats.

John R. Garret is sworn and testifies, and Mrs. Ellen Chapell resumes her testimony, and having concluded, Mrs. J. G. Johnston, F. O. Vincent, the defendant, and L. W. Johnson are sworn, and John Graupman is recalled, and G. B. McIntosh and Dr. C. H. Adair are sworn, and each testify on the part of defendant, and the Court orders an adjournment of the case till 2 o'clock P. M. of this day.

And the jury is placed in charge of Deputy Sheriff Geo. Moore, who is duly sworn according to law.

The Court reconvened at 2 o'clock P. M., when counsel for the People, with the defendant and his counsel, are present in Court, and the jury in their seats.

The defendant, by his counsel, announces that he rests his case, and Henry Smart, John Morse, Geo. Moore, Dr. W. T. Maupin, and Mrs. J. G. Johnston are sworn, and testify in rebuttal on the part of the People, and Dr. C. H. Adair is recalled and testifies on behalf of the defendant, and the testimony is closed.

The cause is argued by F. H. Short on the part of the People, and the Court orders an adjournment of the case till Monday, the 23d instant, at 10 o'clock A. M. of said day.

And the jury is placed in charge of Deputy Sheriff Geo. Moore, who is duly sworn according to law.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 23, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA *against* F. O. VINCENT. } Trial of Cause, Tenth Day.

The trial of this cause is resumed pursuant to adjournment had herein on Saturday.

W. D. Tupper, District Attorney, and F. H. Short, associate counsel for the People, with the defendant and his counsel, S. R. Hart and Henry Hogan, are present in Court and the jury in their seats.

S. R. Hart and Henry Hogan address the jury on behalf of the defendant, pending which argument of the last named counsel the Court orders an adjournment of the case till two o'clock P. M. of this day.

And the jury is placed in charge of Deputy Sheriff Geo. Moore, who is duly sworn according to law.

The Court reconvened at 2 o'clock P. M., when counsel for the People, with the defendant and his counsel are present in Court, and the jury in their seats.

The argument to the jury is resumed by Henry Hogan on behalf of the defendant, who having concluded, is followed by W. D. Tupper on the part of the People, pending which argument of the last named counsel the Court orders an adjournment of the case till to-morrow, the 24th instant, at 9 o'clock A. M., and the jury is placed in charge of Deputy Sheriff Geo. Moore, who is duly sworn, according to law.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., March 24, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
F. O. VINCENT.
} Trial of Cause, Eleventh Day.

The trial of this cause is resumed pursuant to adjournment had herein on yesterday.

W. D. Tupper, District Attorney, and F. H. Short, associate counsel for the People, with the defendant and his counsel, S. R. Hart and Henry Hogan, are present in Court and the jury in their seats.

W. D. Tupper, District Attorney, resumes his argument to the jury on the part of the People, and having concluded, the cause is submitted to the jury, who being first instructed by the Court in the law governing the case, retire in charge of a sworn officer to deliberate upon their verdict, and subsequently coming into Court, and being called, all answer to their names and through their Foreman say:

"We, the jurors, find the defendant guilty of murder in the first degree.
"W. W. MACHEN, Foreman."

Upon application of counsel for defendant the jury is polled by the Clerk, and each of said jurors severally declared the same to be his verdict, and the jury is discharged from further consideration of the case.

By consent of counsel for the defendant, it is ordered that the time for passing sentence upon the defendant herein be, and the same is hereby fixed for Monday, the 6th day of April, 1891, at 10 o'clock A. M. of said day.

Instructions of the Court.

Allowed—
S. A. Holmes, Judge.

GENTLEMEN OF THE JURY: The defendant, F. O. Vincent, is charged by the information filed in this Court against him with the crime of murder, alleged to have been committed in the County of Fresno, State of California, by willfully, feloniously, unlawfully, and of his malice aforethought having killed and murdered one Anna L. Vincent, a human being, on the 18th day of December, 1890.

Under the information in this case you may find one of four verdicts, as the evidence may warrant:

First—Murder of the first degree; or,

Second—Murder of the second degree; or,
Third—Manslaughter; or,
Fourth—Not guilty.

In the Superior Court in and for the County of Fresno, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
F. O. VINCENT.

Counsel for the defense respectfully asks the following instructions to be given by the Court to the jury:

(1)

Allowed—
S. A. Holmes, Judge.

Murder is defined by our statutes to be the unlawful killing of a human being, with malice aforethought. Such malice may be expressed or implied.

It is expressed when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.

All murder which is perpetrated by means of poison, or lying in wait, torture, or any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder in the first degree, and all other kinds of murder are murder in the second degree.

In order to convict the defendant of murder in the first degree, express malice must be affirmatively proved. Express malice is manifested and proved when it appears by the circumstances preceding and connected with the homicide that the killing was unlawful, willful, deliberate, and premeditated.

(2)

Allowed—
S. A. Holmes, Judge.

The chief difference which distinguishes murder in the first degree from murder in the second degree consists in the presence or absence of a willful, deliberate, and premeditated intent to kill. If you find the defendant committed the homicide, the next question to determine is, was the homicide accompanied by deliberate and clear intent to take life? In order to constitute murder in the first deglee, the intent to kill must be the result of deliberate premeditation. It must be formed upon a preëxisting reflection, and not upon a sudden heat of passion, sufficient to preclude the idea of deliberation.

In murder of the second degree there is no deliberation, premeditation, and preconceived design to kill. In both cases—murder in the first and second degree—the killing must have been unlawful and accompanied with malice.

(3)

In order to constitute murder in the first degree in this case, you must find from the evidence that the killing was—

First—Unlawful, because the killing of a human being is in many cases right and proper in the eyes of the law.

Second—You must find that the killing was done in malice. Malice in its legal sense denotes a wrongful act done intentionally without any just cause or excuse.

Allowed—S. A. Holmes, Judge.

Third—The killing must have been willful.

Fourth—It must have been the result of deliberation.

Fifth—It must have been premeditated. And each one of these elements must be proved by the prosecution beyond a reasonable doubt. The law does not imply deliberation and premeditation. That must be proved by the prosecution affirmatively and beyond a reasonable doubt. And if you find that any one of these elements is wanting in this case, or if you have a reasonable doubt as to the existence of any of these elements from the evidence, I charge you that you cannot find a verdict of murder in the first degree.

(4)

Allowed—S. A. Holmes, Judge.

If you shall come to the conclusion from the evidence that the defendant is not guilty of murder, you will then consider the question of manslaughter. Manslaughter is the unlawful killing of a human being without malice, either expressed or implied. Manslaughter differs from murder in the important particular of the absence of malice in the former.

(4 A)

Allowed—S. A. Holmes, Judge.

If you find, from the evidence, that the accused committed the offense charged, the next question for your consideration is whether, at the time the defendant committed the homicide, he was in a state of mind to be made responsible to the law for the killing.

(5)

Allowed as added to—S. A. Holmes, Judge.

Whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury, if they find from the evidence that intoxication existed, may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.

(6)

The law declares that the intent with which a public offense is committed is manifested by the circumstances connected therewith, and the sound mind and discretion of the accused.

Allowed—S.A. Holmes, Judge.

Insanity means such a diseased and deranged condition of the mental faculties as to render the person incapable of distinguishing between right and wrong at the time, and in relation to the act with which he is charged. All men have not the same mental force and characteristics, nor is the same man at all times in the same condition as to mental powers or physical strength. His faculties may be impaired by excesses, and by causes calculated to disturb and influence his passions.

(7)

Allowed—S. A. Holmes, Judge.

In order to constitute crime, a man must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental powers; or, if through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts.

If, therefore, the jury finds from the evidence that the defendant had a mental disease, whether induced by the excessive use of intoxicating drinks, bodily injury, or inherited, or from whatever cause, and that at the time of the homicide that disease was present in the defendant, and acting upon him with such force and effects that for the time being it obliterated his intellectual powers to the extent that he could not determine the purpose, motive, or intent with which he committed the act, you must find him not guilty.

(8)

Allowed—S. A. Holmes, Judge.

If the jury believe, from the evidence, that at the time of committing the homicide the defendant was laboring under such a defect of reason from disease of the mind, whether that disease was inherited, or induced by strong drink, or from whatever cause, as not to know the nature and quality of the act he was doing, or if he did know it, he did not know what he was doing was wrong, then you must find the defendant not guilty.

(9)

Allowed by striking out word "only"—S. A. Holmes, Judge.

In determining the question of insanity the defendant is required to establish that fact by a preponderance of evidence. If, therefore, the jury find that a preponderance of proof shows that defendant, at the time of the commission of the homicide, was insane, they will find him not guilty.

(10)

Allowed—S. A. Holmes, Judge.

If the jury believe from the evidence that at the time the defendant killed the deceased that he, the defendant, was insane, which insanity was inherited or caused by habitual and long continued intemperate use of intoxicating liquor and ardent spirits or drugs, and that by reason of such insanity so caused he was laboring under such a defect of reason and mind as not to know the nature or quality of the particular act with which he stands charged, or if he did know its nature and quality, that he did not know it was wrong, and you find this by a preponderance of evidence, you will find the defendant not guilty.

(13)

Allowed—S. A. Holmes, Judge.

A party charged with crime is not bound to establish his innocence. He is considered innocent until the prosecution establishes the contrary by convincing proof.

(14)

Allowed—
S. A. Holmes,
Judge.

The odious and flagrant character of the crime charged ought not to prejudice you against the defendant without full and sufficient proof that he is guilty, or induce you to convict the defendant upon insufficient and defective proofs.

(14 A)

Allowed—
S. A. Holmes,
Judge.

The jury is instructed that the defendant is charged with the murder of one Anna L. Vincent. I instruct you that it is no more an offense to kill a woman than a man; that in the consideration of this case the fact that the person killed was the defendant's wife is not from that fact alone to weigh in your mind one way or the other in arriving at your verdict.

(15)

Allowed—
S. A. Holmes,
Judge.

This case must not be determined on a mere balance of probabilities, nor must the aggregate probabilities of guilt be considered as sufficiently established while any counter probability or even possibility of innocence is admitted to exist. In short, the jury are to be morally certain of the guilt of the defendant to the exclusion of every reasonable doubt before they can render a verdict of guilty.

(16)

Allowed—
S. A. Holmes, Judge.

In civil cases the decision must be made according to the preponderance of evidence, but this is not the rule in criminal actions. A defendant cannot be convicted unless his guilt is established by more than a mere preponderance of evidence. It is not enough that the jury should be satisfied of his guilt to such an extent that they would be willing to act upon such belief in the ordinary affairs of life. This will not do. The rule is strict, because it is considered better that any number of guilty persons should escape than to adopt a course under which an innocent man might be convicted because of the erroneous conclusions of a Court or jury. Hence it is that the law requires guilt to be proven beyond a reasonable doubt.

(17)

Allowed—
S. A. Holmes,
Judge.

The burden is upon the prosecution, not only to establish the principal facts in the case beyond a reasonable doubt, but every link in the chain of evidence relied upon by the State must be proved beyond a reasonable doubt.

(18)

Allowed—
S. A. Holmes,
Judge.

If, after an impartial consideration of the entire evidence submitted to you, there lingers in your minds a reasonable doubt of the guilt of the accused, you must acquit.

(19)

Allowed—
S. A. Holmes,
Judge.

And where the evidence is equally balanced the decision must be in favor of the defendant, and he is entitled to an acquittal.

(20)

Allowed—
S. A. Holmes,
Judge.

The burden of proving everything essential to the establishment of the crime charged against the defendant, lies on the prosecution.

(21)

Allowed as added to—
S. A. Holmes, Judge.

The burden of proof is upon the prosecution. All the presumptions of law, independent of evidence, are in favor of innocence until the defendant is proved guilty. If, upon the proof, there is a reasonable doubt remaining as to his guilt, the defendant is entitled to the benefit of it by an acquittal, for it is not sufficient to establish the probability, though a strong one, arising from the doctrine of chances, that the facts charged are more likely to be true than the contrary, but the jury must be entirely satisfied of the guilt of the defendant, and unless you are entirely satisfied of his guilt, you must acquit.

(22)

Allowed as added
to—
S. A. Holmes, Judge.

The defendant is presumed to be innocent until his guilt is established by proofs. He is entitled to the benefit of any and all reasonable doubts as to his guilt, and cannot be convicted of any degree of crime unless the jury are convinced from the evidence in the case, beyond all reasonable doubt, that he is guilty of such degree of crime.

(23)

Allowed as added to—
S. A. Holmes,
Judge.

In no case has the jury a right to presume a fact against the defendant, except upon evidence offered and received by the Court; on the contrary, you are to presume his innocence until his guilt is proved beyond a reasonable doubt, and you should weigh every fact and circumstance, and see if it can be reconciled with innocence, and if you can so reconcile it, or if, after so weighing the evidence, there is a reasonable doubt of the defendant's guilt, it would be your duty to acquit him.

(24)

Allowed—
S. A. Holmes,
Judge.

If any one of the jury, after having considered all the evidence in this case, and after having consulted with his fellow-jurors, should entertain a reasonable doubt of the defendant's guilt, then such juror cannot, while he entertains such doubt, consistently with his oath as a juror, agree to a verdict finding the defendant guilty.

(25)

Each juror is to act upon his own individual judgment and upon the facts of the case, and if he entertains a reasonable doubt of the defendant's guilt he is not required to surrender his own conviction and render a verdict of guilty merely because the other jurors entertain no such doubt.

Allowed—
S. A. Holmes, Judge.

(26)

The jury should bear in mind that although every fact and circumstance relied upon by the prosecution in the chain of circumstances is proved to your entire satisfaction, it does not necessarily follow that the defendant is guilty. If the facts so proved can be reconciled upon any reasonable hypothesis, consistent with the defendant's innocence, then you should acquit him. The true rule of law is this: That the facts so proved, in order to justify conviction, must not only be consistent with the defendant's guilt, but must also be wholly inconsistent with any other reasonable hypothesis.

Allowed—
S. A. Holmes, Judge.

(27)

The evidence in this case, to warrant you in finding the defendant guilty, must be entirely consistent with the theory of the defendant's guilt, and inconsistent with every other reasonable theory. And I instruct you that it is your duty to try to reconcile the evidence herein with such theory of the defendant's innocence. And it is not sufficient that the evidence herein is consistent with the theory of the defendant's guilt, or makes it probable that the defendant is guilty of the offense charged. But you must be entirely satisfied that the evidence is entirely inconsistent with the theory of the innocence of defendant, and entirely and solely consistent with the theory of the guilt of the defendant, before you can find defendant guilty.

Allowed—
S. A. Holmes, Judge.

(28)

It is not sufficient that you should entertain a suspicion, no matter how strong that suspicion may be, of the guilt of this defendant from the evidence presented in this case.

This will not warrant you in finding this defendant guilty, but you must be entirely satisfied to a moral certainty and beyond a reasonable doubt that if the offense charged was committed, that this defendant committed the offense charged, and was sane at the time of its commission, and unless you are so satisfied, then you should acquit the defendant.

Allowed—
S. A. Holmes, Judge.

(29)

The Court instructs the jury that the law deems it better that many guilty persons should escape rather than one innocent person should be convicted and punished; so that unless, after careful consideration of all the evidence and circumstances in the case, you can say and feel that every material allegation in the information necessary to constitute the offense charged, or any lesser offense included therein, is proved beyond a reasonable doubt, your verdict must be not guilty.

Allowed—
S. A. Holmes, Judge.

(30)

Allowed—S. A. Holmes, Judge.

I instruct you that laws are made and juries called to investigate cases just as much for the protection of the innocent as for the punishment of the guilty. If, therefore, after a careful consideration of all the evidence, you believe that the defendant is not guilty, you must say so by your verdict, and by so doing the object of the law will be as fully attained as if you were to find a verdict of guilty.

(31)

Allowed—S. A. Holmes, Judge.

I further instruct you that if from the evidence in this case you are satisfied beyond a reasonable doubt that the defendant, under the law, is guilty of murder in the first degree, or that he is guilty of murder as charged in the information, and you return a verdict that the defendant is guilty of murder in the first degree, or that your verdict is that he is guilty of murder as charged in the information, then this Court must sentence this defendant to a death by hanging, and this Court will have no discretion in passing the sentence.

The law of this State is that any person found guilty of murder in the first degree shall suffer death or confinement in the State Prison for life, at the discretion of the jury trying him. I instruct you that if you find the defendant guilty of murder in the first degree you have the power and the right alone to fix the penalty he shall suffer; that is, either death or imprisonment for life, and with you alone rests the question, if you find the defendant guilty of murder in the first degree, as to whether he shall suffer death or imprisonment in the State Prison for life.

[Indorsed:] 651. Superior Court of State of California, County of Fresno. The People *vs.* F. O. Vincent. Instructions offered by the defendant, thirty-one in number. Filed 24th March, 1891. A. C. Williams, Clerk. By W. S. Badger, Deputy.

Allowed—S. A. Holmes, Judge.

In this case it is not claimed by the prosecution that the homicide charged was committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or mayhem, but it is claimed that it is murder in the first degree as being unlawful, malicious, willful, deliberate, and premeditated. In this class of cases, the Legislature leaves the jury to determine from the evidence before them the degree of the crime, but prescribes for the government of their deliberation the same test, which is: Is the killing willful, deliberate, and premeditated? The unlawful killing must be accompanied with a deliberate and clear intent to take life in order to constitute murder of the first degree. The intent to kill must be the result of deliberate premeditation. It must be formed upon a preëxisting reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation. There need be no appreciable time between the intent to kill and the act of killing. They may be as instantaneous as successive thoughts of the mind. It is only necessary that the act of killing be preceded by a concurrence of will, deliberation, and premeditation on the part of the slayer, and if such is the case the killing is murder in the first degree, no matter how rapidly these acts of the mind may succeed each other, or how quickly they may be followed by the act of killing.

From these definitions the jury will see that any unlawful killing of a human being with malice aforethought is murder, but if nothing further characterizes the offense it is murder of the second degree. To constitute the higher offense there must be superadded to the general definition above given willfulness, deliberation, and premeditation. By willfulness is meant that it was of purpose, with the intent that by the given act the life of the party should be taken.

Allowed— S. A. Holmes, Judge.

It must be deliberate and premeditated. By this it is not meant that the killing must have been conceived or intended for any particular length of time. It is sufficient if it was done on reflection and conceived beforehand; and in this view, as I have said before, the deliberate purpose to kill and the killing may follow each other as rapidly as successive impulses or thoughts of the mind. It is enough that the party deliberate before the act, premeditate the purpose to slay before he gave the fatal blow. But while the purpose, the intent, and its execution may follow thus rapidly upon each other, it is proper for the jury to take into consideration the shortness of such interval, if it were short, in considering whether such sudden and speedy execution may not be attributed to sudden passion and anger rather than to deliberation and premeditation, which must characterize the higher offense.

Allowed— S. A. Holmes, Judge.

From what I have said you will see that the distinction between the two grades of offense is that in murder of the first degree, unless it was committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, the killing must be deliberate and premeditated. In the one case there is a deliberate and premeditated, preconceived design, though it may have been formed on the mind immediately before the mortal wound was given, to take life. In the other case there is no deliberation, premeditation, or preconceived design to kill. In both, however, the killing must have been unlawful and accompanied with malice.

Allowed— S. A. Holmes, Judge.

In every crime or public offense, gentlemen of the jury, there must exist a union or joint operation of act and intent or criminal negligence.

Allowed— S. A. Holmes, Judge.

Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

Allowed— S. A. Holmes, Judge.

In this case, if you find from the evidence that the defendant fired the fatal shot, then the burden of proving circumstances of mitigation or that justify or excuse the homicide devolves upon the defendant, unless the proof upon the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

Allowed— S. A. Holmes, Judge.

The law presumes every man to be innocent until his guilt is established beyond any reasonable doubt, and this presumption attaches at every stage of the case and to every fact essential to a conviction. But by a reasonable doubt is not meant every possible or fanciful conjecture that may be suggested. Everything relating to human affairs and depending upon moral evidence is open to some fanciful doubt or conjecture. By a reasonable doubt is meant that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge.

Allowed— S. A. Holmes, Judge.

In every public offense there must exist a union or joint operation of act and intent, or criminal negligence.

The intent or intention is manifested by the circumstances connected with the offense, and the sound mind and discretion of the accused; and I further instruct you that all persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity to such an extent as to be unable to discern right from wrong.

A malicious and guilty intent is always presumed from the deliberate commission of an unlawful act, for the purpose of injuring another.

Allowed— S. A. Holmes, Judge.

Section 26 of the Penal Code of this State provides that all persons are capable of committing crimes except those belonging to certain classes, among which are idiots, lunatics, and insane persons, and persons who committed the act charged without being conscious thereof. This section is intended to include all persons who are not of sound mind from any cause.

When considered in relation to crime, it is a general rule that persons who are in that condition which the law recognizes as of unsound mind or insane, are not responsible criminally for their acts when in that condition. But it is also true that mere weakness of mind alone, or slight mental ailments which do not exclude the knowledge of right and wrong, and the power to act in accordance with the plain dictates of reason and justice, does not constitute unsoundness of mind or insanity in law.

Allowed— S. A. Holmes, Judge.

The true test of criminal responsibility, where the defense of insanity is interposed, is whether the accused had, at the time he killed the deceased, sufficient use of his reason to understand the nature of the act he was committing, and to understand that it was wrong and contrary to law for him to commit it. If this was the fact, he is criminally responsible for it, whatever peculiarities be shown about him in other respects; whereas, if his reason was so defective in consequence of mental disorder, generally supposed to be caused by brain disease, that he could not understand what he was doing, or that what he was doing was wrong, he should be treated as an irresponsible person. In other words, did he at the time know that he was killing a human being, and that such killing was wrong and contrary to law? If so, he was responsible for his acts.

Allowed—
S. A. Holmes, Judge.

In prosecutions for crimes the defense of insanity is often interposed, and has become a subject of paramount importance in criminal jurisprudence. A due regard for the ends of justice and the peace and welfare of society, no less than mercy for the accused, require that such a defense should be thoroughly and carefully weighed. And although it is a defense which you may feel is sometimes wrongfully resorted to, especially in cases where aggravated crimes have been committed, under circumstances which afford full proof of the overt act, and render hopeless all other means of evading punishment, you should receive it as a no less full and complete than it is a human defense, when it has been satisfactorily established by a preponderance of the evidence. And yet a defense of insanity should be examined into by the jury with great care, lest an ingenious counterfeit of the malady furnished protection to guilt.

Allowed—
S. A. Holmes, Judge.

A person is presumed to be sane until the contrary is shown. Sanity is presumed to be the normal state or condition of the human mind, and, therefore, it is not incumbent upon the prosecution in proving the case to give affirmative evidence that the defendant was sane at the time of the alleged homicide.

Allowed—
S. A. Holmes, Judge.

I therefore instruct you that the burden of proving that the defendant was insane at the time of the alleged homicide is upon him, and the presumption that he was sane, in his right mind, able to discern right from wrong, must prevail, until he shows by a preponderance that such presumption is false. In this connection I instruct you that the preponderance of evidence here mentioned does not depend on the number of witnesses testifying to the fact of insanity or the circumstances relied upon to show it.

Allowed—
S. A. Holmes, Judge.

You are not bound to decide the question of insanity in this case in conformity with the declarations of any number of witnesses, which do not produce conviction in your minds, against a less number, or against a presumption or other evidence satisfying your mind. You should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify, their acquaintance with and knowledge of the defendant, and their opportunities of judging of his mental condition; their conduct and demeanor while giving their testimony, their interest or lack of interest in having the insanity of the defendant established; the probability or the improbability of their several statements, in view of all the other evidence, facts, and circumstances proved at the trial, if any; and from all these circumstances, you should determine upon which side is the weight or preponderance of the evidence on the question of insanity.

Allowed—
S. A. Holmes, Judge.

I charge you that if you believe from the evidence, beyond a reasonable doubt, that the defendant did kill the deceased as charged, and you should then find that there is a preponderance of evidence in favor of the defense of insanity, and by which you determine that the defendant was insane at the time of the alleged homicide to such a degree that he did not know that his act was wrong, or that if he did know that it was wrong, he had no power to restrain himself, then you should find him not guilty.

Allowed—
S. A. Holmes, Judge.

I instruct you that if you believe from the evidence, beyond a reasonable doubt, that the defendant did kill the deceased as charged, and you then find by the preponderance of the evidence on the question of insanity, that at the time of the alleged homicide he had capacity and reason sufficient to enable him to distinguish between right and wrong as to this particular homicide, if any; that is, if he had at that time knowledge sufficient and was conscious that he was doing a wrong and would deserve punishment, the law considers him to have been of sound mind and memory, and capable of committing crime, and it is your duty, under your oaths, to find him guilty in the degree you may determine from the evidence and under these instructions.

Allowed—
S. A. Holmes, Judge.

I instruct you that one who, in possession of a sound mind, commits a criminal act under the influence of passion or revenge, which may temporarily dethrone his reason or, for the time being, control his will, cannot be shielded from the consequences of the act by the plea of insanity or irresistible impulse. And therefore if you believe from the evidence beyond a reasonable doubt that the defendant killed the said deceased as charged, without legal justification or excuse, but that at the time of the killing he was of sound mind, but that he was in such a passion of rage towards deceased, or was so filled with a desire to wreak his vengeance upon deceased for some real or fancied injury, that his reason was thereby and for the time being dethroned, and his power to control his will thereby and for the time being gone, he is not to be excused from the consequences of his act, and you must find him guilty.

Allowed—
S. A. Holmes, Judge.

I instruct you that there can be no such thing as an impulse to commit a crime, which is absolutely irresistible, when there is a capacity to distinguish between right and wrong with reference to such acts, if there remains a will sufficient to control the impulse; and there is no impulse which is uncontrollable and which leaves the reasoning powers—including the capacity to appreciate the nature and quality of the particular act—unaffected by mental disease.

In the Courts of California there is no such doctrine recognized as moral insanity distinguished from mental derangement as an excuse for crime and as an exemption from punishment therefor.

Allowed—
S. A. Holmes,
Judge.

There is no such type of insanity recognized in our Courts as, for instance, that a person may steal your property, burn your dwelling, murder, or attempt to murder you, and know at the time that the deed is a criminal act, and wrong in itself, and deserves punishment, having the ability to reason correctly on the subject, and yet be held guiltless, and not punishable, on the ground solely of a perversion of the moral senses.

Allowed—
S. A. Holmes, Judge.

If a person has sufficient mental capacity to appreciate the nature of his act, if he knows and understands that he is violating the rights of another by an act which is in itself wrong, and which is prohibited by the law, and the commission of which will entail punishment on himself; if he has the capacity thus to appreciate the character and comprehend the consequences of his act, he is responsible to the law for the act thus committed, and must be judged accordingly, regardless of any perversion of the moral senses, however great.

Allowed— S. A. Holmes, Judge.

The jury are instructed that voluntary intoxication or drunkenness is no excuse for crime committed under its influence, and no act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act.

It is a well-settled rule that drunkenness is no excuse for the commission of crime.

Allowed— S. A. Holmes, Judge.

Insanity, produced by intoxication, does not destroy responsibility when the party, when sane and responsible, made himself voluntarily intoxicated, and drunkenness forms no defense whatever to the fact of guilt, for when a crime is committed by a party while in a fit of intoxication, the law will not allow him to avail himself of his own gross vice and misconduct to shelter himself from the legal consequences of such crime.

Allowed— S. A. Holmes, Judge.

Evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and for this purpose it must be received with great caution.

Allowed— S. A. Holmes, Judge.

Drunkenness neither excuses the offense nor avoids the punishment which the law inflicts, when the character of the offense is ascertained and determined, but evidence of drunkenness is admissible with reference solely to the question of premeditation.

Allowed— S. A. Holmes, Judge.

In cases of premeditated murder the fact of drunkenness is immaterial. A man who is drunk may act with premeditation as well as a sober one, and is equally responsible for the consequences of his act.

Allowed— S. A. Holmes, Judge.

In murder of the first degree it is necessary to prove the killing was premeditated, which involves, of course, an inquiry into the state of mind under which the party committed it, and, in the prosecution of such an inquiry, his condition as drunk or sober is proper to be considered. The weight to be given to it is a matter for the jury to determine, and it is sufficient for the Court to say to the jury that it should be received with caution, and carefully examined in connection with all the circumstances and evidence in the case.

Allowed— S. A. Holmes, Judge.

That defendant has been examined as a witness upon his own behalf. This is his right to be, and the jury will consider his testimony as they will that of any other witness examined before you. It is proper, however, gentlemen, for the jury to bear in mind the situation of the defendant, the manner in which he may be affected by your verdict, and the very grave interest he may feel in it; and it is proper for the jury to consider whether this position and interest may not affect his credibility or color his testimony.

Allowed—
S. A. Holmes, Judge.

The jury are the sole judges of the evidence in the case. It is for them alone to judge of the credibility of the witnesses, of the weight to be given to the evidence and of its effect and conclusiveness to establish any fact for which it was offered. In so doing they may consider the character, so far as it may appear from the evidence and appearance of the witnesses, the consistency and reasonableness of their statements, and from these and such reasons as may have appeared to the jury upon the case presented, may judge and determine as to the credibility, weight, effect, and sufficiency of such testimony.

Allowed—
S. A. Holmes, Judge.

Under the information in this case the jury may, if the evidence warrant, find the defendant guilty of murder in the first degree, murder in the second degree, or manslaughter. Should the jury entertain a reasonable doubt as to which of the grades of crime named the defendant may be guilty of, if any, they will give the defendant the benefit of such doubt and acquit him of the higher offense. That is to say, gentlemen of the jury, should you be convinced by the evidence beyond a reasonable doubt that the defendant is guilty of a murder, and yet have a reasonable doubt as to whether he is guilty of murder of the first or second degree, you can only find him guilty of murder of the second degree. So if the doubt in your mind be as to whether he is guilty of murder in the first or second degree, or of manslaughter, you can find him guilty of manslaughter only.

Allowed—
S. A. Holmes, Judge.

Should your verdict be one of conviction, you should designate the grade of the offense found. Should your verdict be a conviction of murder in the first degree, the statute permits the jury to award the penalty. This may be death or imprisonment for life in the State's Prison. Should the jury find the defendant guilty of murder in the first degree without affixing any penalty, the law in such cases adjudges the penalty, and that penalty is death. In thus apportioning, the lawmakers have assumed that homicide of the same general nature may be characterized by different degrees of atrocity, and have left the severer penalty to be applied to the higher offense in the sound and discriminating judgment of the jury.

Should your judgment be one of conviction, you should state the degree of the offense of which you convict. Should your verdict be one of acquittal, you will simply say: We, the jury, find the defendant not guilty.

Allowed—
S. A. Holmes, Judge.

If the jury render a verdict of acquittal on the ground of insanity alone, the form of your verdict should be: We, the jury, find the defendant not guilty, on the ground of his insanity.

In any case your verdict must be unanimous, and should be signed by your foreman as such.

Under the information in this case the defendant may be convicted of either murder in the first degree, murder in the second degree, or of manslaughter, as the evidence may warrant under these instructions.

If the jury should believe the defendant, beyond all reasonable doubt, guilty of the crime of murder in the first degree, as defined in these instructions, then you should so find by your verdict.

If you should find the defendant guilty of the crime of murder in the first degree, and think that the death penalty should be inflicted, the form of your verdict will be:

"We, the jury, find the defendant guilty of murder in the first degree."

If you should find the defendant guilty of murder in the first degree, you have the right to determine by your verdict whether he shall suffer death or be imprisoned in the State's Prison of this State for the term of his natural life.

Allowed—
S. A. Holmes,
Judge.

If you should determine by your verdict that the defendant is guilty of murder in the first degree, and desire that he be imprisoned in the State's Prison for the term of his natural life, the form of your verdict will be:

"We, the jury, find the defendant guilty of murder in the first degree, and fix the penalty at imprisonment in the State's Prison for the term of his natural life."

If the jury believe, from the evidence, to a moral certainty and beyond all reasonable doubt, that the defendant is guilty of the crime of manslaughter, you should so find by your verdict, in which event the form of your verdict will be:

"We, the jury, find the defendant guilty of the crime of manslaughter."

Unless you are entirely satisfied of the guilt of the defendant you cannot find him guilty of any degree of crime, and should return a verdict of not guilty.

Allowed—
S. A. Holmes, Judge.

If you find the defendant not guilty, the form of your verdict will be:

"We, the jury, find the defendant not guilty."

In any event your verdict must be unanimous, and be signed by your foreman.

Gentlemen of the jury: This case is now submitted to you for your determination. Carefully and candidly consider and examine all the evidence received in this case, and a true verdict render, as by your oaths you have sworn to do.

[Indorsed:] 651. Superior Court, County of Fresno. The People *vs.* F. O. Vincent. People's instructions. Filed 24th March, 1891. A. C. Williams, Clerk. By W. S. Badger, Deputy.

Not Allowed—
S. A. Holmes,
Judge.

If the jury have a reasonable doubt from the whole evidence as to whether the defendant, at the time of the commission of the homicide, was insane by reason of long continued use of intoxicating drinks or drugs, or inherited such insanity, which for the time deprived him of his reason so that he did not know right from wrong, you will acquit the defendant.

Not Allowed—
S. A. Holmes,
Judge.

The Court further instructs you, gentlemen of the jury, that as no insane person can commit a crime, it necessarily follows that if the jury have a reasonable doubt of the defendant's sanity, they must also have a reasonable doubt of his guilt. To doubt his sanity is to doubt his guilt, and to doubt his guilt, if the doubt be a reasonable one, is to acquit, in which case you must find a verdict of not guilty.

[Indorsed:] 651. Superior Court, County of Fresno. The People, etc., *vs.* F. O. Vincent. Defendant's instructions refused. Filed 24th March, 1891. A. C. Williams, Clerk. By W. S. Badger, Deputy.

Verdict.

We, the jurors, find the defendant guilty of murder in the first degree.

W. W. MACHEN,
Foreman.

[Indorsed:] Verdict. Filed 23d March, 1891. A. C. Williams, Clerk. By W. S. Badger, Deputy.

Passing of Sentence Continued.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., April 6, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; George Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE, ETC.,
vs.
F. O. VINCENT.
} Passing of Sentence Continued.

By request of counsel for the defendant, it is ordered that the time for passing sentence upon the defendant herein be and the same is hereby continued till Wednesday, the 8th inst., at 9 o'clock A. M. of said day.

Motion for New Trial, and Order Denying Motion.

In the Superior Court of the County of Fresno, State of California.

FRESNO, Cal., April 8, 1891.

The Court convened. Present: Hon. S. A. Holmes, Judge; Geo. Moore, Deputy Sheriff; W. S. Badger, Deputy Clerk; J. W. Gearhart, Reporter.

THE PEOPLE OF THE STATE OF CALIFORNIA
against
F. O. VINCENT.
} Motion for New Trial—Order Denying Motion—Sentence.

The District Attorney, with the defendant and his counsel, Henry Hogan and S. R. Hart, came into Court. The defendant was duly informed by the Court of the nature of the information filed against him for the crime of murder, committed on or about the 18th day of December, 1890, of his arraignment and plea of not guilty, of his trial, and the verdict of the jury, to wit:

"We, the jurors, find the defendant guilty of murder in the first degree. W. W. Machen, Foreman."

The defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which defendant, by his counsel, replied that he had, and thereupon moved the Court for a new trial of this case, upon the following grounds, to wit:

That the Court misdirected the jury in matters of law.

That the Court erred in decisions of questions of law arising during the course of the trial.

That the verdict is contrary to law and evidence.

That the Court erred in allowing the jury to be empaneled, for the reason that the original jury in this Court had been drawn from the Great Register of this county instead of from the assessment roll, as required by law; and for the further reason that the special venire issued herein were summoned by an officer who was on the regular venire, and who was excused therefrom for actual bias.

That the Court erred in refusing the defendant's motion for a change of venue.

And upon the further ground that the evidence was insufficient to support the verdict.

The said motion is opposed by the District Attorney and is submitted to the Court without argument, and after duly considering thereof and being fully advised in the premises, the Court orders that the said motion for a new trial of this cause be and the same is hereby denied, to which ruling of the Court the defendant, by his counsel, excepts.

And no sufficient cause being shown or appearing to the Court,

Thereupon the Court renders its judgment:

That whereas, the said F. O. Vincent, having been convicted of the crime of murder in the first degree,

"Wherefore, the judgment of the law and the sentence of the Court is now here, in open Court, and in your personal presence, pronounced against you, which is that you, F. O. Vincent, at the time and place to be designated in the warrant for your execution, shall be hanged by the neck until you be dead."

State of California, } *ss.*
County of Fresno. }

I, A. C. Williams, Clerk of the Superior Court of the State of California, in and for the County of Fresno, do hereby certify that the foregoing is a full, true and correct copy of an order made and entered on the minutes of said Superior Court, in the above entitled action, on the date mentioned in the caption thereof.

In witness whereof, I have hereunto set my hand and the seal of said Superior Court, this 8th day of April, A. D. 1891.

[seal.]
A. C. Williams, Clerk.
By W. S. Badger, Deputy Clerk.

[Indorsed:] No. 651. Superior Court of the County of Fresno. The People, etc., Plaintiff, *vs.* F. O. Vincent, Defendant. Judgment roll. Filed 8th April, 1891. A. C. Williams, Clerk. By W. S. Badger, Deputy. W. D. Tupper and F. H. Short, Plaintiff's attorneys. S. R. Hart and Henry Hogan, Defendant's attorneys.

Notice of Appeal.

In the Superior Court of the County of Fresno, State of California.

The People of the State of California }
against } Notice of Appeal.
F. O. Vincent. }

To the Honorable Superior Court of the County of Fresno—to the District Attorney of said county, and attorney for the People herein—to the County Clerk of the County of Fresno:

You will please take notice that the defendant, F. O. Vincent, appeals to the Supreme Court of California, from the final judgment of conviction rendered and entered in the above entitled cause on the 8th day of April, A. D. 1891, and also appeals to the Supreme Court of the State of California from the order made and entered on the 8th day of April, 1891, in said Superior Court, denying defendant's motion for a new trial therein.

S. R. HART and
HENRY HOGAN,
Defendant's Attorneys.

Dated April 9, 1891.

[Indorsed:] Filed April 9, 1891. A. C. Williams, Clerk. By W. S. Badger, Deputy.

Bill of Exceptions.

In the Superior Court of the County of Fresno, State of California Department No. 2, before Hon. S. A. Holmes, Judge.

The People of the State of California
against
F. O. Vincent.
} Bill of Exceptions.

The above cause came on regularly for trial on the 11th day of March, 1891, whereupon the following proceedings were had:

B. F. Carey, T. F. Schell, D. J. Mullins, A. H. McCrory, J. H. Northcraft, J. O. Byxby, C. P. Walton, Frank Dusy, D. P. Blevins, William Echard, Jr., S. L. Reed, and E. R. Winters, jurors in attendance on Court upon the regular panel, were called and sworn to answer questions touching their qualifications to act as jurors in the above entitled action.

The nature of the case was stated to said jurors, and said above named jurors were examined by the District Attorney for the people, and by the counsel for defendant, touching their qualifications to act as jurors in the said case.

B. F. Carey, T. S. Schell, A. H. McCrory, J. H. Northcraft, J. O. Byxby, D. P. Blevins and E. R. Winters were excused for cause; and D. J. Mullins, C. P. Walton, Frank Dusy, Wm. Echard, Jr., and S. L. Reed were challenged peremptorily by the counsel for the defendant; after which the following named jurors, being in attendance upon the trial of said cause, were called into the jury-box and sworn to answer questions touching their qualifications to act as jurors in said cause, to wit: D. M. Wilson, C. F. Cherry, M. J. Lindrose, Daniel Nichols, A. Harbison, Joseph Burns, Ambrose Cartwright, H. G. Spaulding, J. W. Noland, N. M. Trezevant, W. C. Filloon, and W. A. Linforth, of which last named jurors D. M. Wilson, C. F. Cherry, M. J. Lindrose, Daniel Nichols, Joseph Burns, Ambrose Cartwright, H. G. Spaulding, and N. M. Trezevant, and W. C. Filloon, and W. A. Linforth were excused for cause, and A. Harbison and J. W. Noland were challenged peremptorily by counsel for the defendant.

Whereupon, the following named parties were called as jurors, being in attendance upon said Court as jurors for the trial of said action, to wit: J. L. Kurtz, G. R. G. Glenn, W. H. Gardner, M. R. Madary, John Crawford, W. S. White, J. H. Morrow, J. A. Greenup, Alex Grieve and

C. A. Owen, which exhausted the venire of jurors then present in Court, whereupon the following proceedings were had:

BY THE COURT (to counsel for defendant): Do you consent to go on and examine these, so as to form some idea how many special jurors to order?

COUNSEL FOR DEFENDANT: We would like to have a full box, if the Court please.

THE DISTRICT ATTORNEY: The defendant wants a full box before they are sworn to answer a question. I suppose he has a right to that.

THE COURT: Yes.

THE DISTRICT ATTORNEY: But I suppose a special venire could be issued now.

THE COURT: Yes. I am obliged to issue it to fill the box. I will make an order that the Sheriff summon seventy-five good and lawful men from the county, and have them returned here by 9 o'clock, Friday, the 13th of March, 1891.

Whereupon the Court charged the jurors then in the box as follows:

You, gentlemen, will be careful and have no conversation among yourselves, and let nobody converse with you or in your presence, in regard to this matter, the facts concerning this matter, and be here at 9 o'clock Friday morning.

On Friday morning, March the 13th, 1891, the following preceedings were had:

Counsel for the defendant stated to the Court: If it is proper at this time, we desire to enter a challenge to the panel, no juror having yet been sworn.

We challenge this panel, because it is formed from persons whose names are not drawn as jurors upon the regular panel, as well as those that are in the box who are on the regular panel, and we make our challenge to fit both, for the reason that we claim that the subsequent venire, although it is a special venire, constitutes this same jury in this action and in this Court. We take the challenge to the panel on the ground of the bias of the officer who summoned them.

We also desire to enter a challenge to the original panel, or what remains of it, on the ground that the provisions of the Code of Civil Procedure of the State of California, which provides for the manner in which trial jurors in Courts of record shall be drawn, has not been complied with in this, that the names of the parties who were selected to serve as jurors in this panel were not drawn, according to the statute, from the assessment roll of this county, but that the Great Register of this county was used in the making up of the list.

Counsel further challenging, says: We challenge this panel and this special venire, this entire panel in this cause; first, upon the ground that that which we may deem, for the purpose of this challenge, the original panel, or what remains of it, ten men, now in the box, remaining now from the original panel, upon the ground that it is not properly drawn by the first officers; in other words, that the provisions of the Codes of the State were not complied with in drawing their names from the assessment roll of this county for the year preceding the one upon which they were drawn. We further challenge the special venire which was issued by this Court for the purpose of filling out this jury which was originally drawn, upon the ground that this particular special panel is formed from persons whose names were not drawn as jurors, and that we take a challenge to the panel on the ground of the bias of the officer who summoned them, and which bias was good ground of challenge to that officer as a juror on the original panel or if he were summoned as a juror now.

To which challenge the District Attorney stated: The People, if the Court please, as to the first cause of challenge, demur to the same on the ground that such challenge, if taken at all to that portion of the jury remaining of the regular panel now in the jury-box, who have not been examined on their *voir dire*, should have been taken before any juror of that regular panel was sworn upon his *voir dire* to answer questions touching his qualifications to act as a juror in this case; and then we deny that challenge upon the facts, as to the second challenge to the special venire, deny the challenge and require proof of the fact.

Whereupon, the following testimony is introduced:

JAMES COLLYER.

Sworn.

MR. HOGAN: What is your name? A. James C. Collyer.

Q. What position, if any, do you occupy in this county? A. Under Sheriff.

Q. Who is the Sheriff? A. J. M. Hensley.

Q. Yes, sir. I suppose you are aware of the case of The People of the State of California against F. O. Vincent? A. I have heard of it; yes, sir.

Q. On trial in Department No. 2. of the Superior Court of the County of Fresno, State of California? A. Yes, sir.

Q. As the Under Sheriff, you are familiar with the duties and the performance of the work of the Sheriff's office of the county in the last few days? A. Yes.

Q. What has been done there? A. I know something about it.

Q. You are the gentleman who has charge of the office work generally? A. Yes, sir.

Q. Do you remember of receiving an order from this honorable Court dated the 11th day of March, 1891, under the seal of the Clerk of this Court, attested by A. C. Williams, by W. S. Badger as Deputy Clerk of this county? A. I remember receiving a venire for jurors. I don't know who it was attested by; I don't remember.

Q. (Handing paper to witness.) Are you acquainted with Mr. Badger's signature? A. Yes, sir.

Q. Is this his signature attached to this document? A. Yes, sir.

MR. TUPPER: We admit that, Mr. Hogan; that the venire was issued by this Clerk.

MR. HOGAN: Q. In pursuance of that order, the executive officer of this county proceeded to summon, as per the order of this Court, seventy-five talesmen as jurors to appear here to-day? A. Yes, sir.

Q. Who made the service? A. Mr. Picket, Mr. McCrory, and McArdle.

Q. McCrory? A. Yes, sir.

Q. Is Mr. McCrory the gentleman who was summoned as a juror in this case before? A. I think he was; yes.

MR. HOGAN: Will you admit that this was the same Mr. McCrory?

MR. TUPPER: Well, I want to see.

Q. Is it the same McCrory that was here on the regular panel? A. I think so.

THE COURT: A. H. McCrory? A. A. H. McCrory, of Kingsburg.

MR. TUPPER: Q. He is Deputy Sheriff? A. He is Deputy Sheriff.

Q. You say he summoned some of these jurors? A. He summoned the first twenty-five that appear on the returns.

MR. TUPPER (to the reporter): Well, now, will you please read what Mr. McCrory said the other day?

[The reporter here reads the examination of A. H. McCrory when called and sworn on his *voir dire* on March 11, 1891, as follows]:

"MR. HART: Q. Mr. McCrory, where do you reside? A. Down to Kingsburg.

"Q. How long have you lived in California? A. I was born in California.

"THE COURT: Answer the question 'how long.' A. Twenty-nine years last October.

"Q. (By Mr. Hart): How long have you lived in Fresno County? A. About 23 years—22 or 23. I believe I came to Fresno County in '61—I mean to say in 1865.

"Q. What is your business? A. What was it, you said?

"Q. What is your business? A. I have been saloon-keeper and Constable for the last two years previous to the first of January, this year.

"Q. Are you assessed on the last assessment roll? A. Yes, sir.

"Q. Have you heard anything which purported to be a statement of the facts in this case at bar? A. Yes, sir; I have read it in the 'Expositor,' and heard it talked of.

"Q. Have you talked with any one who purported to know anything about the facts of this case? A. Yes, sir.

"Q. A witness in the case? A. No; I don't know that I ever talked with any of the witnesses in the case.

"Q. Have you expressed an opinion in regard to the case? A. Yes, sir.

"Q. Is that a qualified or unqualified opinion? A. Well, it is a qualified opinion.

"Q. Do you think it would require evidence to remove it? A. Yes, sir; it would require evidence.

"Q. A great deal of evidence? A. I think it would.

"MR. HART: We challenge the juror for the existence of that state of mind—

"MR. TUPPER: We don't resist."

Whereupon, the challenge to the panel of the special venire was not resisted by the District Attorney.

The Court thereupon made the following order in regard to said special venire:

You, gentlemen, who were summoned as jurors on this special venire, a challenge having been taken to the special venire on the ground of the manner in which they were selected, and that challenge being considered good by the Court, the gentlemen who were summoned on that special venire are excused from any further attendance on the Court.

Whereupon, the challenge of counsel for the defendant to the ten jurors remaining in the box of the original panel was allowed, and said jury were excused from any further attendance upon Court.

The Court thereupon ordered that a special venire issue for one hundred jurors, returnable at 10 o'clock, March the 14th, 1891.

Whereupon, the District Attorney gave notice to counsel for the defendant that upon the special venire ordered by the Court to be in attendance to try this case, that the defendant should have the right to twenty peremptory challenges upon said special venire.

On March the 14th, 1891, this case was regularly proceeded with, the special venire of a hundred jurors being in attendance upon Court, the counsel for defendant interposed a challenge to the panel of said special venire, on the following grounds, to wit:

The objection is based upon Section 1064 of the Penal Code of this State. We challenge this panel because it is formed from persons whose names are not drawn as jurors; in other words, that it is a special venire. We take the challenge to the panel on account of the officer who summoned them, and which would be a good ground of challenge to a juror. We make this challenge in the same form and ask that it be determined in the same manner as if this panel were a single juror. We ask this Court to be enabled to give such evidence here as will show to the Court that a regular panel was drawn in this county from the Great Register of this county, and not from the assessment roll; that a portion of that panel was called into the box in this case; that a challenge was interposed to that panel and the challenge allowed and the panel discharged, and that there is not now in this Court or in this case any regularly impaneled jury or any jury drawn for the term; further, that the special venire that was issued subsequent to the exhausting of the first improperly drawn panel in this Court was objected to upon the ground that the panel was formed from persons whose names are not drawn or were not drawn as jurors, and the objection made to the panel before on account of the bias of the officer who summoned them, and which would have been good ground of challenge to the juror.

It appeared upon the trial of this case and of that question that the officer who summoned this special venire, one A. H. McCrory, was a Deputy Sheriff of the county; and further, that he had been a juror upon the first irregularly drawn panel, and had been examined in the box and under the challenge made by the defendant for actual bias, under the second subdivision of Section 1073, was excused by the Court. Upon such showing the Court then, and at that time, allowed that challenge and discharged the venire. Now, upon this return of the present venire, there are at least some seventeen men, if not more, who were upon the special venire which was discharged from this Court, as jurors for the trial of this cause. We challenge the panel upon that ground, and in support thereof cite Section 1064 of the Penal Code of the State of California, and also depend upon, in this objection, upon the following section of said Code, to wit, 1065.

The sufficiency of the facts alleged as a ground of challenge was denied by the District Attorney, and the following proceedings were had:

Testimony of L. L. Boone.

Sworn.

Mr. Hogan: Mr. Boone, you were summoned as a juror yesterday? A. To appear yesterday.

Q. In this town? A. Yes, sir.

Q. City of Fresno? A. Yes, sir.

Q. Were you summoned to appear here to-day? A. Yes, sir.

Q. At ten o'clock this morning? A. Yes, sir.

Q. By an officer of this county? A. Yes, sir.

Q. Were you summond—were you on the other panel that was discharged the day before? Were you summoned at Selma? A. No, sir.

Q. Were you summoned on the other panel? A. I was summoned to serve on the panel that was discharged yesterday.

Q. That is what I mean. You were summoned to serve on the special venire returned yesterday morning at 9 o'clock? A. Yes, sir.

MR. TUPPER: In other words, you were summoned on both venires? A. Yes, sir.

MR. HOGAN: That is all, sir.

MR. TUPPER: Now, Mr. Boone, who summoned you on the first panel? A. Mr. Pickett, I think, is the gentleman's name.

Q. Who summoned you on the second panel? A. A man by the name of Smart, I think, is on the paper.

Q. Do you know one A. H. McCrory at Kingsburg, a Deputy Sheriff? A. I don't think I do.

Q. Were you summoned either time by Mr. McCrory? A. No, sir.

MR. TUPPER: That is all.

MR. HOGAN: That is all, Mr. Boone.

TESTIMONY OF E. M. RUSSELL.

Sworn.

MR. HOGAN: Mr. Russell, were you summoned on both venires? A. Yes, sir.

MR. HOGAN: That is all, sir.

MR. TUPPER: Who summoned you on the first venire? A. Mr. McCrory.

Q. Where did you live? A. Near Selma.

Q. Near Selma? A. Yes, sir.

Q. Mr. McCrory summoned you on the first venire? A. Yes, sir; Mr. McCrory, I think, had my name on the first venire, E. D.

MR. TUPPER: That is all.

TESTIMONY OF A. D. JONES.

Sworn.

MR. HOGAN: Mr. Jones, were you summoned on both venires? A. Yes, sir.

MR. TUPPER: Q. Who summoned you on the first? A. Mr. McCrory.

Q. What is your name—A. B. Jones? A. A. D. Jones.

Q. Do you live near Selma? A. I do.

TESTIMONY of W. S. HOPKINS.

Sworn.

MR. HOGAN: Q. Mr. Hopkins, were you summoned on both venires? A. Yes, sir.

MR. TUPPER: Q. Who summoned you on the first? A. Mr. McCrory.

MR. TUPPER: That is all.

TESTIMONY of D. DISMUKES.

Sworn.

MR. HOGAN: Q. Were you summoned on both venires? A. Yes, sir.

MR. TUPPER: Q. Who summoned you on the first? A. Mr. Pickett.

Q. You were not summoned by Mr. McCrory? A. No, sir.

MR. TUPPER: That is all.

TESTIMONY of D. D. REED.

Sworn.

MR. HOGAN: Q. Mr. Reed, were you summoned on both venires? A. Yes, sir.

Q. Who summoned you on the first? A. Mr.——, I forget his name.

Q. Were you summoned by Mr. McCrory? A. No, sir.

Q. Not summoned by him either time? A. No, sir.

TESTIMONY of S. B. HOLTON.

Sworn.

MR. HOGAN: Q. Mr. Holton, were you summoned on both venires? A. I was.

MR. TUPPER: Q. Who were you summoned by on the first venire? A. I don't know his name; a gentleman in Selma; an officer there.

Q. Was it Mr. McCrory? A. I think so; I think he was on the stand yesterday in the examination.

Q. What? A. I think that was the same man on the stand yesterday—the officer. I don't know his name.

Q. He wasn't on the stand here yesterday—a man named McCrory—with a sandy mustache. I think he lives in Kingsburg. A. I never saw him before—the man.

Q. You think it was him? A. I don't know.

Q. You don't know whether it was? A. I don't know whether it was.

Q. Where were you summoned? A. In Selma.

Q. In Selma? A. Yes, sir. I think I would know him if I would see him.

Q. Have you got your—— A. Not with me.

Q. Your notice of summons? A. Not with me.

MR. TUPPER: I presume he was the officer. That is all.

TESTIMONY OF W. R. WOOD.

Sworn.

MR. HOGAN: Mr. Wood, were you summoned on both venires? A. No, sir.

MR. HOGAN: That is all, sir.

MR. TUPPER: That is all. Is there another gentleman named Wood in the room?

MR. C. R. WOOD: C. R. Wood.

MR. TUPPER: Mr. Wood, you take the stand.

TESTIMONY OF C. R. WOOD.

Sworn.

MR. TUPPER: What are your initials, Mr. Wood? A. C. R.

Q. (By Mr. Hogan.) Were you summoned on both venires, Mr. Wood? A. Yes, sir.

MR. TUPPER: Q. Who were you summoned by? A. Mr. McCrory, in Selma.

MR. TUPPER: That is all.

TESTIMONY OF C. HENRY.

Sworn.

MR. HOGAN: Q. Mr. Henry, were you summoned on both venires? A. I was.

Mr. Tupper: Q. Who summoned you on the first? A. Mr. McCrory.

Mr. Tupper: That is all, sir.

Testimony of Robert Staley.

Sworn.

Mr. Hogan: Q. Were you summoned on both venires, Mr. Staley? A. Yes, sir.

Mr. Tupper: Q. On the first one by Mr. McCrory? A. Yes, sir.

Testimony of Donald Bruce.

Sworn.

Mr. Hogan: Q. Mr. Bruce, were you summoned on both venires? A. Yes, sir.

Mr. Tupper: Q. Who summoned you on the first? A. Mr. Pickett.

Mr. Hogan: Now, if your Honor please, that is all the names I have got marked, but I would ask your Honor, on the part of the defendant, now to ask any of the other jurors whose names have not been read and who are present, summoned on both venires, to make it now known to the Court.

Mr. Tupper: No objection. Ask them to step around and take their seats in the jury-box.

Mr. Hogan: Well, any of the gentlemen who are jurors, here present in this Court-room, who were summoned on both venires, will kindly step forward.

Mr. Tupper: Any parties who were summoned to be here yesterday, and summoned to be here to-day, will come around, except those that we have examined. Will you gentlemen be kind enough to give your names? Your name, please?

The following jurors gave their names: A. A. Hoffman, N. Martin, R. M. Crow, J. W. Wilkins, C. G. Anderson, M. B. Garner, T. B. Snedden, Charles Moore, H. Larsen, A. B. Ward, and H. F. Berry.

Mr. Tupper: Very well. Now, to expedite matters, Mr. Hogan, let them all be sworn at once.

Mr. Hogan: Yes, sir.

Mr. Tupper: Swear them all to answer questions upon the matter to be submitted to them.

The eleven talesmen are here sworn to answer questions.

Mr. Tupper: Mr. Hoffman, who summoned you on the first venire? A. Mr. McCrory.

Q. Mr. Martin, who summoned you? A. Mr. McCrory.

Q. And you, Mr. Crow? A. Mr. McCrory.

Q. And Mr. Wilkins, who summoned you? A. Mr. Pickett.

Q. Mr. Anderson, who summoned you? A. I don't know the gentleman's name. One of the Deputy Sheriffs here.

Q. It wasn't McCrory, who lives at Kingsburg? A. No.

Q. I mean the first time? A. No.

Q. Mr. Garner, who summoned you? A. Mr. McCrory.

Q. Mr. Snedden? A. Mr. McCardle.

Q. Mr. Moore, who summoned you? A. McCardle.

Q. Mr. Larsen, who summoned you? A. McCardle.

Q. Mr. Ward, who summoned you? A. Pickett.

Q. Mr. Berry, who summoned you? A. Pickett.

Mr. Tupper: There are only four, Hoffman, Martin, Crow, and Garner, and there are eleven altogether.

The Court denied the challenge, to which ruling of the Court the defendant excepted.

Examination of E. M. Russell.

First duly sworn, touching his qualifications to act as a juror herein.

Mr. Hogan: Mr. Russell, do you know anything about the case, Mr. Russell? A. No; I couldn't say that I do. I think at the time that the crime was committed I read a little sketch or the heading of it.

Q. Not enough to make up your mind about it? A. No; I had forgotten all about the case——

Q. Until you were examined? A. Yes, sir.

Q. Are you a married man? A. I am.

Q. Have you any daughters, Mr. Russell? A. Yes, sir.

Q. Are they married? A. No.

Q. Have you any bias or prejudice against this defendant? A. No, sir.

Q. Would you give him a fair and impartial trial if you were accepted as a juror in this case? A. I would.

Q. You wouldn't allow any of these outside influences we have been talking about here to weigh in your mind one way or the other in deciding the case here? A. No, sir.

Q. You would decide it according to the evidence given here, and under the instructions of the Court, if you are accepted as a juror? A. I certainly should.

Q. You would not allow any outside feeling to weigh either one way or the other, would you, in reference to the case? A. No.

Q. Would it make any difference to you that the defendant is charged with having killed a woman? A. No, sir.

Q. If the Court told you that the law did not make any difference between a man and a woman as far as the defense itself was concerned, you would take that in consideration? A. I certainly would.

Q. Are you biased or prejudiced against a man who takes intoxicating liquors? A. No, sir.

Q. Are you biased or prejudiced against a plea of insanity in cases when it is properly presented? A. No, sir.

Q. You believe that every man has a right to place such a plea before the Court as well as the plea of self-defense, or any other legitimate legal plea? A. Yes. sir.

Q. Are you biased or prejudiced against the belief that men can have hereditary diseases and inclinations come down from father to son? A. No, sir.

Q. You are not opposed to such a belief as that? A. No, sir.

Q. Do you know of anything now in any manner personal to yourself that would prevent you from giving this defendant a fair and impartial trial if you were chosen as a juror in this case? A. I do not.

Q. You will, if you are taken, give him that? A. Yes, sir.

Q. Give him the benefit of every doubt? A. Yes, sir.

Mr. Hogan: Pass the juror.

Mr. Tupper: You say you don't know the defendant, Mr. Russell? A. No, sir.

Q. You live in Kingsburg? A. I live just west of Kingsburg.

Q. You know of nothing to prevent you from acting fairly and impartially in the case? A. No, sir.

Q. Are you a Mason, Mr. Russell? A. I am not.

Q. Mr. Russell, have you ever sat on a jury in a murder case? A. I have.

Q. In this county? A. Yes, sir.

Q. What case was it? A. I think it was the China case from Madera.

Q. It was a China case? A. Yes, sir.

Q. What are your views on the subject of capital punishment, Mr. Russell? A. I think it is good——

Q. You think it is a good law? A. Yes, sir.

Q. Ought to be enforced in proper cases? A. Yes, sir.

Mr. Tupper: Pass him.

Mr. Hogan: Q. Mr. Russell, you sat on a murder case—the Chinese case? A. Yes, sir.

Q. Was the Chinaman convicted of murder by the jury, or do you remember? A. I think he was.

Mr. Tupper: Q. Mr. Russell, you were summoned on the first venire? A. I was.

Q. And on the second special venire? A. Yes, sir.

Q. Summoned by Mr. McCrory? A. Yes, sir; I was.

Q. Where were you summoned? A. I went to lodge that evening in Selma.

Q. What lodge was that? A. Knights of Pythias.

Q. Mr. Russell, did Mr. McCrory tell you what case it was when he summoned you? A. No, sir; he just handed me the paper as I was walking by him and I asked him what that was and he says: "You will appear at Court——"

Q. As a juror? A. Yes, sir—"Friday at 9 o'clock." I supposed then it was at Kingsburg. I went on and afterwards I looked at the paper and saw what it was.

Q. Did you ever have any conversation with Mr. McCrory in reference to this case? A. No, sir.

Q. Would the fact that you were summoned as a juror on the special venire by Mr. McCrory in any manner affect your mind in arriving at a verdict in this case if you were selected as a juror? A. No, sir.

Q. You have no prejudice or bias against this defendant? A. Not at all.

Q. And nothing in his past life that you know of would cause any prejudice against him in your mind? A. No, sir.

Q. Nothing to prevent you from acting with entire impartiality? A. No, sir.

Q. You were on the last assessment roll of this county? A. I am. I am perfectly ignorant, you might say, about the case.

Q. Well, you will pardon these questions, but you understand some point was raised about Mr. McCrory? A. Certainly.

Mr. Hogan: We pass the juror.

The Court: Fill the box.

Examination of A. D. Jones.

First duly sworn, touching his qualifications to act as a juror herein.

Mr. Tupper: Mr. Jones was summoned on both venires.

Mr. Hogan: Do you want him or not?

MR. TUPPER: I just simply informed you of that fact.

MR. HOGAN: Mr. Jones, do you know anything about the case? A. Only what I read.

Q. You live down at Selma? A. Yes, sir; in that vicinity.

Q. Farmer by occupation? A. Farmer and stockraiser.

Q. How old a gentleman are you? A. About 65.

Q. Gentleman of family? A. Yes, sir.

Q. Daughters? A. Yes, sir.

Q. Married? A. Yes, sir.

Q. How many? A. One married, and one son.

Q. They reside in the county? A. Yes, sir.

Q. How long have you resided in Fresno County? A. I have been in the county twelve years.

Q. What State are you a native of? A. I was born in New York, principally lived in Illinois, and from there to Iowa, and Iowa here.

Q. What portion of New York? A. Near Oswego.

Q. Near Oswego. How long did you live in Iowa? A. I lived in Iowa seven years.

Q. Then came on farther westward? A. To California.

Q. Where were you married? A. Married in Iowa.

Q. Married in Iowa? A. Yes, sir.

Q. Were you ever a juror in a criminal case before? A. Yes, sir.

Q. In this county? A. Yes, sir.

Q. Murder case? A. Yes, sir.

Q. Was the man convicted or acquitted? A. Well, some was convicted and some was not. I have been on several.

Q. You have been on several? A. Yes, sir.

Q. Have you any bias or prejudice against any man by reason of the fact that he has been informed against by the District Attorney, or indicted by a Grand Jury, from that alone? A. No, sir; not until he is proven guilty.

Q. Sir? A. Not until he is proven guilty.

Q. You recollect men that were innocent, or that you believed to be innocent, to have been brought into Court and tried? A. Yes, sir.

Q. You would take—having been a juror before, you know that the rule is to take the evidence according to what is given in Court, and not anything that you may have heard on the outside? A. Yes, sir.

Q. Do you think that you are possessed of that class of mind that you could lay aside any prejudice that you might hear on the outside, and judge simply by the evidence given here on the stand under the rules of law, under the direction of the Court? A. I do; I think that is my duty.

Q. You think that would be your duty? A. Yes, sir.

Q. Yes, sir; that is a juror's duty, but can you do that? A. I can.

Q. You will lay aside what you may have heard about this case, whatever you may have heard on the outside, and try it according to what came in here? A. Yes, sir.

Q. All outside you would take as hearsay? A. Yes, sir.

Q. You have not now—you could not now find a verdict, if this case was submitted to you, that Mrs. Vincent even was dead, could you? A. No; I could not.

Q. You don't know whether she is dead or not? A. I don't know whether she is dead or not.

Q. You didn't see her dead? A. No, sir.

Q. You have not had any evidence in a Court of justice showing you to your own knowledge that she was dead? A. No, sir.

Q. Or that Mr. Vincent, or Mr. Tupper, or myself killed her? A. No, sir.

Q. You would be governed by what evidence would be produced on the stand here as to whether she was dead, or as to who killed her? A. Yes, sir.

Q. Have you in your mind now any bias or prejudice for or against this defendant? A. No, sir.

Q. In any manner in the world? A. No, sir.

Q. Do you know anything in your past life, or in your own history, or in your own mind, that would prevent you from giving this man a fair and impartial trial if you were accepted by the Court as a juror in this case? A. I do not.

Q. You would give him a fair trial under all the evidence taken here? A. Yes, sir.

Q. Have you any opinion as to his guilt or innocence now? A. None.

Q. Although you have not heard about the case? A. Yes, sir.

Q. Are you acquainted with any of the witnesses in the case? A. No, sir.

Q. Mrs. Johnson, Mrs. Redd, and Mr. Ragsdale, and some other gentlemen and ladies? A. Acquainted with none of them.

Q. Sir? A. Acquainted with none of them.

Q. From the fact that there have been other homicides committed in this county, not more so than other counties in this State and other States, but from the fact that there have been several come to trial recently here, would that make any effect with you in your mind in trying this defendant? A. No, sir.

Q. You would give him just as fair a trial as if this was the only case before the Court this term? A. I would.

Q. If there should be any popular feeling against this class of cases, that wouldn't weigh in your mind in deciding whether he was guilty or innocent, if you were taken as a juror here? A. No, sir.

Q. If the Court should instruct you that the law of the land is that a man must, in order to be convicted of a criminal charge, be proven by the prosecution to have committed the act, and to have had the intention to commit the act at the time he committed it, and you found that he had committed the act, but that there was such evidence as satisfied you that he didn't know what he was doing when he did it, and if such was the case a crime could not be committed and he was not responsible, would you acquit him? A. I would.

Q. You have, then, no prejudice on account of the fact of it being a plea that is sometimes abused, the plea of insanity; you have no prejudice against that plea as a plea? A. No, sir.

Q. You wouldn't have any prejudice against a man because he simply put that plea in? A. No, sir.

Q. Any more than you would if one man was charged with shooting another with a pistol or a shotgun, and he claimed he did it in self-defense? A. No, sir.

Q. You would not have any more prejudice against this plea because it was insanity than against the plea of self-defense? A. No sir.

Q. Or against an alibi, a man proving he was not there when the offense was committed? You wouldn't have any more prejudice against this plea on account of its being insanity, would you? A. No, sir.

Q. You believe that there are men who are insane? A. I do.

Q. You believe that there are men who, by reason of some fact, either coming through a dispensation of Providence, or through some act of God, or nature, that they lose their mind, do you not? A. Yes, sir.

Q. Have you got any prejudice or bias against a man because he uses or is addicted to the use, either inordinately often or otherwise, of intoxicating liquors? A. I don't approve of a man using intoxicating liquors. If a man done an act when he was insane then he would be excused.

Q. But my question was, would you have any prejudice against a man charged with an offense simply because he was a drinking man? A. No, sir.

Q. You feel that men are better without drinking? A. I do.

Q. That is your belief? A. That is my belief, sir.

Q. But from the fact that men do do it, that some men do drink, you would not condemn them alone on that account, would you? A. No, sir.

Q. Have you any prejudice or bias against the belief of medical men, especially if testimony should be produced to satisfy you from medical men that they believe that a man could have those tendencies passed down to him from father to son, the same as he might have near-sightedness or deafness, desires for drinking, desires for the use of drugs —would you think that that could not be possible, or have you any prejudice against that belief? A. I feel that it is hereditary.

Q. You believe in heredity? A. Yes, sir.

Q. Both in insanity—— A. Yes, sir.

Q. Desires for drink—— A. Yes, sir.

Q. Desire for gambling, with some men—— A. I do; yes, sir.

Q. Near-sightedness in other men, deafness in some people, disease or consumption in others? You believe that a father can give to his son and the son not knowing it, those influences? A. I do.

Q. You have no disbelief against that theory? A. No, sir; I have no disbelief.

Q. If it was shown to you that in the commission of an act the man's mind was in such a state from the use of intoxicating liquors, from the use of narcotics, the use of drugs, that he was not in a condition to be able to appreciate his acts, and the Court would instruct you that if you found that to be the fact, would you take that instruction and give the prisoner the benefit of that? A. I would.

Q. Do you think you can act if you were taken as a juror in this case fairly in every sense, laying aside any outside prejudices or causes, and act as one citizen ought to act toward another in the jury-box if you are accepted as a juror in this case? A. I think I could.

Mr. Hogan: Pass the juror.

Mr. Tupper: Q. Mr. Jones, are you opposed to capital punishment? A. No, sir.

Q. You think it is a good law? A. Yes, sir.

Q. Do you think it ought to be enforced in proper cases? A. I do.

Q. Have you any personal acquaintance with the defendant? A. No, sir.

Q. Are you a Mason? A. Sir?

Q. Are you a Mason? A. No, sir.

Q. Sir? A. No, sir.

Q. You know of nothing whatever now to prevent you from acting fairly to the People in this case, as well as to the defendant? A. I do not.

MR. TUPPER: Pass him.

MR. HOGAN: Pass him.

Out of said venire of one hundred jurors, the following were sworn to try the case, to wit: H. P. Holmes, J. J. Elwell, A. D. Jones, H. L. Nudd, E. M. Russell, W. Buchanan, John Cobby, W. W. Machen, J. E. Pollard, and Byron Van Valkenberg. Whereupon, a special venire was issued for forty jurors, returnable at 2 o'clock on March the 18th, 1891, at which time the following proceedings were had:

After an examination of several jurors touching their qualifications as jurors, the following two jurors were accepted and sworn as jurors in said case out of said venire of forty, to wit: John McGarry and Charles Clarke.

In the selection of the jury in this case the defendant exercised only seventeen peremptory challenges.

In support of the motion for a change of venue, the defendant introduced the following affidavits:

In the Superior Court of the County of Fresno, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
F. O. VINCENT.

STATE OF CALIFORNIA, } *ss.*
County of Fresno.

F. O. Vincent, being first duly sworn, on his oath, deposes and says, in furtherance of his motion for a change of venue of this cause, made this day, and verifying his said application to this Court: That he is the defendant in this cause; that he has been informed against by the District Attorney of this county in this Court of the crime of murder, alleged to have been committed in this county on the 18th day of December, 1890; that he is therein charged with unlawfully and feloniously, and of his malice aforethought, killing one Anna L. Vincent; that he believes it is impossible for him to have a fair and impartial trial in the county of Fresno, owing to the great prejudice and bias existing in said county against him; that he believes and alleges the fact to be that the people of this county are greatly prejudiced against him, for many reasons, and that, in support of this belief, and in support of this motion, he states the facts and circumstances in this affidavit contained; that special counsel for the prosecution has (as defendant has been informed, and believes and so states the facts to be) been employed to assist an already able District Attorney to conduct the prosecution of this case, notwithstanding the fact that the said District Attorney of this county has an Assistant District Attorney learned in the law to assist and help him in the preparation and trial of this case, and that said Deputy District Attorney is assisting and helping in the prosecution of this case; that the affiant is informed and believes that the citizens of Fresno County, or some of them, have contributed to pay said assistant counsel alleged herein to be other than said District Attorney and his said assistant, and that said special counsel is so assisting and lending aid to said public prosecutors by reason of his said employment; that within the year last past in the county of Fresno a very great number of homicides have occurred, fast following one on the other; that it is a fact of public knowledge that J. D. Fiske that was killed on the streets of Fresno; that a negro woman was shot and killed in Fresno by a man named Mars; that a man named Bradway was killed; that a defendant named Sullivan is now awaiting trial for killing of one Corrick in this county; that in the county jail of this county are now two men convicted within a few weeks last past, one for manslaughter, the other murder; that many other homicides not now occurring to your deponent have transpired recently; that many other felonies have been committed in a short time in this county; that many people of the county are not entirely satisfied with the fact that no death penalty has yet been meted out to alleged offenders; that the public press of this county has repeatedly called the attention of readers to the fact that a stop must be made to offenses against the law; that the people of this county have and do feel under present existing circumstances that an example should be made of some one; and, as your deponent verily believes the fact to be that public opinion has to a large extent centered upon this deponent as a subject to make such example of; and that such feeling on the part of many of the people as deponent believes to exist is wrought up to its present pitch by reason of the aforesaid allegations, and that such feeling against him is not in any manner warranted by all the facts in his case, when a cool and unbiased knowledge of his defense can be made known to the people; that very many jurors have already been examined in his case and none as yet have been qualified to give him an impartial trial; that the examination of the talesmen called and examined to be sworn in as jurors to give him an impartial trial shows that, being, as they are, drawn from all parts of the county, that the prejudice and bias against him is widespread, that the offense with which he is charged and which this Court must try, on its face is believed by great numbers of people of this county who are not familiar with all the circumstances surrounding this alleged homicide to have been unwarranted and atrocious; that the difficulty to secure an impartial jury is entailing great expense upon the county, and great inconvenience upon its citizens, thus intensifying the ill-feeling of the taxpayers and the talesmen who are necessarily summoned and brought away from their homes to be in attendance upon this Court for this trial; that subsequent to the date of said alleged homicide, as your deponent has lately been informed and believes, and for such reason here alleges the fact to be, many citizens of this county upon the public streets asserted their belief that the defendant should be illegally dealt with and taken from the custody of the officers of the law and be deprived of his life. That owing to telegraphic communications with other parts of the world and the publishing of news by papers circulating in this county, printed here and in other places, the people of this county have learned that a mob of many citizens of the city of New Orleans, in the State of Louisiana, took violently into their own hands the law and without due course of law killed men alleged to have committed murder, and as your deponent is informed and believe and fears that such an act so committed and so known to have been committed has tended to increase the desire your affiant believes exists in this county to destroy his life without due process; and your affiant verily and truly believes from his knowledge of all these things that he cannot secure that fair and impartial trial the laws of this country grant every man, in this county; nor that he can secure his constitutional rights in regard to his trial at any time within this county; that, subsequent to his being held to answer, citizens of this county circulated a petition asking for a speedy trial of his cause, which said petition was addressed to this, as defendant understands, honorable Court and the prosecuting officer of this county, and was given widespread circulation throughout the public places and the private houses of this county by the newspapers published herein; that your affiant truly believes that, under the existing state of circumstances, he cannot have a fair and impartial trial within the county of Fresno.

F. O. VINCENT.

Subscribed and sworn to before me, this 17th day of March, A. D. 1891.

A. C. WILLIAMS,
Clerk.
By W. S. BADGER,
Deputy.

AFFIDAVIT OF HENRY HOGAN. (After the title of the Court and cause.)

STATE OF CALIFORNIA, } ss.
County of Fresno. }

Henry Hogan, being first duly sworn, deposes and says: That he is an attorney at law, and, by virtue thereof, and of his oath, an officer of the Courts of this State; that in the fulfillment of his duty as such attorney he came to Fresno, in this county, to act as an assistant counsel in the case of this defendant, charged with murder; that he arrived here after the case had been called in this Court, and after the examination of the talesmen summoned in this case had been commenced; that he was not familiar with the facts of the case; that he had been suddenly summoned into the case by reason of the inability of Hon. G. G. Goucher to assist Mr. S. R. Hart, associate counsel in this case; that he deemed it his duty to go among the people whenever he could to find evidence in this case; that he met many citizens of Fresno City; that he made diligent inquiry to find facts in the case; that in such investigation he discovered that a great prejudice existed against the defendant, growing, as the defendant believes, and therefore alleges the fact to be, from the reason that many offenses have been alleged to have been of late committed in this county; that many people believed the defendant in this case to be guilty of the offense charged, even before he had had his trial; that, after going into the examination of talesmen to ascertain their qualifications as jurors, and finding from their sworn testimony in open Court that they came from different locations in this county, that he thus acquired a knowledge that the fact exists that the people of many of the different portions of this county, as well as those residing near the county seat, had become biased and prejudiced against this defendant, and to a large degree biased and prejudiced; that from all the knowledge your affiant could gain of this community, and of the citizens thereof, and of their opinions and feelings, your affiant feels that he can safely make affidavit that from his source of information he can give testimony that he verily believes that this defendant cannot obtain a fair and impartial trial in the county of Fresno, not from any fact that the prosecuting officers would do less or more than their duty, or that the honorable Court of this county would do other than exact an impartial justice, but that the feeling and popular opinion prevalent in this county is such that your deponent verily believes that this defendant cannot secure, all things considered, such a fair and impartial trial as the laws of the land warrant, and should give him as a citizen.

HENRY HOGAN.

Subscribed and sworn to before me, this seventeenth day of March, A. D. 1891.

A. C. WILLIAMS,
Clerk.
By W. S. BADGER,
Deputy.

AFFIDAVIT OF S. R. HART. (After the title of the Court and cause.)

STATE OF CALIFORNIA, } ss.
County of Fresno. }

S. R. Hart, being first duly sworn, says that he is one of the attorneys for the defendant; that as such he has sought evidence among the people on behalf of the defendant; that he is acquainted with many people in the county of Fresno; that since the ending of the criminal trial just preceding the commencement of this action, he has found an intense feeling against this defendant; he has been informed, and believes, that a great many people in this county are biased and prejudiced against this defendant, knowing that many criminal cases, and particularly homicides, have recently occurred in this county; he now finds among the people, as far as he knows, an expression and feeling that this defendant be convicted, and that the defendant cannot, in belief of affiant, safely go to trial in this county; that he cannot have a fair and impartial trial herein.

S. R. HART.

Subscribed and sworn to before me, this 17th day of March, 1891.

A. C. WILLIAMS,
Clerk.
By W. S. BADGER,
Deputy.

AFFIDAVIT OF S. R. HART. (After the title of the Court and cause.)

STATE OF CALIFORNIA, } ss.
County of Fresno. }

S. R. Hart, being first duly sworn, on his oath deposes and says: That he is an attorney at law and is one of the attorneys for the defendant, charged with murder. That said defendant was held to answer, informed against, and arraigned, and pleaded not guilty to the information. That subsequent to his plea of not guilty the case of the defendant was set down for trial on the 2d day of March, 1891. That in said Court at the time of the setting of this case for trial, there had already been other felony cases called up regularly, to wit: The case of the People *vs.* Lane, charged with murder; the People *vs.* Smith, also chaged with murder; the People *vs.* Sullivan, also charged with murder; the People *vs.* Williams *et al.*, charged with arson; the People *vs.* ———, charged with burglary; that many days were consumed in the trial of these cases; that they were cases of importance, and that the affiant was unable to know with any considerable degree of certainty when the case of the People *vs.* Vincent would be reached for trial. That the trial of the case of the People *vs.* Smith, charged with murder, was completed on the — day of March, 1891. That the case of the People *vs.* Williams *et al.* was to be tried subsequent and following the trial of the People *vs.* Smith; that affiant has been informed by counsel for the defendant in the Williams cases that two or three weeks would be occupied in the trial of these Williams cases; that the People *vs.* Vincent, as affiant believes, would not be reached for trial until about the first of April; that on the close of the case of the People *vs.* Smith, for good and sufficient cause, the Court continued the trial of the Williams arson cases, and on sudden notice the case of Vincent, the defendant herein, was immediately called, and on a half day's notice called for trial. That Hon. G. G. Goucher had been retained to assist affiant in the trial of this case; that the said Goucher, an attorney of this Court, was then and is now, as affiant believes and so states the fact to be, an officer of the State of California and a Senator thereof, and was then and still is in attendance to his duties as such in the city of Sacramento, the capital of the State, and by his oath as a representative there necessarily detained to fulfill his obligations; that affiant immediately notified him by telegraph of the coming up of this case; that said Goucher could not be in attendance on this Court as an attorney by reason of his official duty, and was therefore necessarily compelled to withdraw from this case. That as affiant is informed and believes the Hon. George Hearst, a United States Senator from California, has recently died, and that it was the duty of said Goucher to remain in the body that by law was to select a successor for said Senator Hearst. That had such a contingency not happened that in all probability the body of which Mr. Goucher was a member would have by operation of law fulfilled its work, and the said Goucher could have been discharged from his obligations and returned to Fresno and assisted in the preparation of the trial of this case, providing that the belief of affiant that the case would not be reached for trial until about the first of April, as aforementioned, was correct. That although this affiant knew that the people of the county of Fresno were to a greater or less extent feeling that many homicides had been committed, this affiant did not know or believe that the fact of the other homicide trials before this Court and this jury would result as they did, or that the people would feel that sufficient punishment might not be given to offenders. That affiant did not believe then that this defendant would not be enabled to secure a fair and impartial trial in this county. That affiant knew then that there was existing some bias and prejudice against this defendant, but did not believe that it was so widespread and universal as to prevent him having a fair and impartial trial. That had this case not been called for trial unexpectedly after the trial of J. D. Smith, and had affiant thought that he would not have had sufficient time to prepare and present a proper and lawful motion for a change of venue, this affiant would have made the proper preparation to present said motion before the first day of April, the time that affiant believed would be about the period this case would be called. That after the trials in said Court referred to affiant believes that the fact is now discovered to him that owing to the many violations of law lately committed in this county, and the conviction of defendants in the cases tried just prior to the calling of this case, and which convictions, as affiant is informed and believes, many people of this county think and feel should be of higher grades; affiant now believes, and on his information and belief, states that many of the citizens of this county are more prejudiced against this defendant than they were before; that affiant had no means of knowing what the result of said trials would be, and that they would result in awakening a bitter feeling against this defendant, as he verily believes they have done; that upon his being called suddenly into the trial of the cause of his client, and being, by reason of the absence of said expected assistant counsel, alone on the outset of this case, so unexpectedly set, he was physically unable to make the preparation for the trial of this defendant, and to make the proper and legal presentation of a motion to change the venue of this case, and to find and present the proper and legal evidence in support thereof; that all his time and energy was devoted to the proper preparing of his case upon the trial; that this was, to his mind, the best method to pursue at the time, fearing that physically he could not succeed in preparing a successful motion for a change of venue, and that his duty to his client demanded that he not take the risk of an overruling of his motion, and thus be forced to the trial of a serious issue in a murder case unprepared. This affidavit is made in the furtherance of exact justice: and, in support of the motion now made to this Court to continue this case, so that the defendant may properly comply with the provisions of Section 1034 of the Penal Code of this State, as it is the intention of this defendant to move this Court to grant him a change of venue in this cause.

S. R. HART.

Subscribed and sworn to before me this 17th day of March, A.D., 1891.

A. C. Williams,
Clerk.
By W. S. Badger,
Deputy Clerk.

In rebuttal to the above affidavits,

F. H. SHORT,

Being duly sworn, testifies as follows:

I am special counsel for the People in this case; no one has raised any money in this county to employ me as special counsel in this case, nor has any one agreed to pay me for my services as such counsel. I am neither District Attorney nor Assistant District Attorney of this county.

Q. Have you been employed to assist the prosecution by any citizen of this State? A. Well——

Q. Are you under employment? A. I appear—yes, sir—for the prosecution.

Q. Under employment? A. Well, I think the only proper question at this time is as to whether I am employed by any citizen of the county. I simply go on the stand in answer to the defendant. I say I am not employed by any citizen of this county.

MR. TUPPER (District Attorney): I submit, if your Honor please, that this is not material to the issue joined.

MR. HOGAN (counsel for defendant): Well, if your Honor please, suppose this gentleman had volunteered his services in this case, isn't the defendant entitled to know that on the settlement of this motion?

Q. Have you volunteered in this case, Mr. Short?

MR. TUPPER: We think that is immaterial, irrelevant and incompetent.

THE COURT: I will sustain the objection to those questions.

MR. HART (counsel for defendant): We except.

Q. Have you any bias or prejudice in this case? A. I think not.

Q. Do you know whether you have or not? A. I have no bias or prejudice in the case.

Q. Have you any feeling in the matter as against this defendant? A. Not as against the defendant.

Q. As against the offense with which he is charged? A. I have some; yes, sir.

Q. Are you, in furtherance of that feeling, appearing here as assistant counsel for the prosecution? A. No, sir.

Q. I understand you to say you are not under employment in the case? A. I said I was not under employment by any citizen of Fresno County.

After hearing the aforesaid affidavits and testimony, and the argument of counsel, the Court denies the motion for a change of venue, and counsel for the defendant duly excepted.

(A)

AT FRESNO, April 11th, 1891—4 P. M.

Mr. H. H. Welsh, Assistant District Attorney, and S. R. Hart, one of counsel for defendant, being in Court, the following proceedings were had:

THE COURT: The People of the State of California *vs.* F. O. Vincent, convicted of murder in the first degree. F. O. Vincent, being present in Court, and also represented by his counsel, Mr. S. R. Hart, Mr. Clerk, you will let the minutes show this order. Let the minutes show that Friday, the 29th day of May, 1891, is fixed as the time for the execution of sentence of the defendant, F. O. Vincent; also let the minutes show that the warrant for the execution of said judgment, in which the time is so fixed, is handed in open Court to E. N. McCardle, a Deputy Sheriff of Fresno County. That is all.

MR. HART: To which order, if the Court please, we object, and desire to have our exception entered to the ruling, and to any of the proceedings that are now taken in this matter.

THE COURT: Just note that, Mr. Reporter.

(B)

That immediately following the rendition of which verdict, and immediately thereupon the following transpired:

MR. HOGAN: If your Honor please, I desire to state right now that at the time of the rendition of this verdict this community applauded the verdict of this jury, and to take an exception to it.

THE COURT: Let the exception be noted.

Within the time allowed by law, and the order of the Court, this bill of exceptions was prepared and presented for settlement in accordance with law.

The foregoing bill of exceptions is hereby settled and allowed, and is correct, this 23d day of May, A. D. 1891.

S. A. HOLMES,
Judge of Superior Court.

Clerk's Certificate.

STATE OF CALIFORNIA, } ss.
County of Fresno. }

I, A. C. Williams, County Clerk and ex officio Clerk of the Superior Court in and for the County of Fresno, State of California, do hereby certify that the foregoing printed pages contain a full, true, and correct copy of the judgment roll, composed of the following named papers, to wit: Information, Arraignment and Time to Plead, Plea, Statutory Time of Trial Waived by Defendant and Trial Set, Minutes of the Court Upon the Trial of the Cause, Instructions in the Case, Instructions Refused, Verdict of the Jury, Order Continuing Time for Passing Sentence, Motion for a New Trial, Order Denying Motion, and Judgment and Sentence of the Court in the case of the People of the State of California against F. O. Vincent, and also a true and correct copy of the Notice of Appeal and Bill of Exceptions in said action.

In witness whereof I have hereunto set my hand and affixed the seal of said Court, this 9th day of June, A. D. 1891.

[SEAL.]

A. C. WILLIAMS,
Clerk.
By W. S. BADGER,
Deputy Clerk.

Stipulation.

In the Supreme Court of the State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,
vs.
F. O. VINCENT, Defendant and Appellant.

It is hereby stipulated and agreed as follows:

I.

That the above entitled cause was brought to this Court upon an appeal taken by the defendant from a final judgment of conviction rendered in the above entitled cause in the Superior Court for the County of Fresno, State of California, on the 8th day of April, 1891, and also from an order made upon the same day in the same cause and by the same Court, denying said defendant's motion for a new trial therein.

II.

That upon the hearing of the appeal herein said defendant and appellant, in the briefs and upon the argument, made objection to the aforesaid verdict and judgment in the words and figures following:

"The judgment in this case is a violation of the Fourteenth Amendment of the Constitution of the United States, because the execution of said judgment would deprive appellant of life without due process of law.

"The alleged crime of murder, of which appellant stands convicted, was committed on the 18th day of December, 1890. On that day the only law which authorized the execution of a death sentence was Sections 1217 and 1229 of the Penal Code.

"On the 31st day of March, 1891, the Legislature passed a statute amending these provisions and repealing them. People *vs.* McNulty, 26 Pac. Rep. 597; 28 Pac. Rep. 816; 29 Pac. Rep. 61.

"In the case last cited this Court held that the Act of 1891 was *ex post facto* as to all crimes committed before its enactment. It was also therein held that Sections 1217 and 1229 of the Penal Code were repealed by the Act of 1891.

"There, therefore, now exists in this State no law authorizing the execution of the judgment in this cause, and there was no such law on the day the judgment appealed from was rendered.

"To execute the judgment in this case would not simply be depriving appellant of life without due process of law. It would be depriving him of life without any law at all.

"This is in the very teeth of the Fourteenth Amendment of the Constitution of the United States.

"Neither Section 1217 nor Section 1229 of the Penal Code is a 'law creating a criminal offense.'

"We respectfully submit that in the nature of things Section 329 of the Political Code cannot be made applicable to the facts in this case, and to make it applicable is violation of the provision of the Constitution of the United States against depriving a man of life without due process of law."

III.

That this stipulation be filed herein, and the same is hereby made a part of the record in this action, to be used on the hearing of the writ of error herein in the United States Supreme Court.

WM. H. H. HART, Attorney-General,
Attorney for Plaintiff and Respondent.
HENRY HOGAN,
GEORGE R. B. HAYES, and
CARROLL COOK,
Attorneys for Defendant and Appellant.

Filed February 24, 1893.

Filed July 25, 1892. Appeal from the Superior Court of Fresno County—S. A. Holmes, Judge. For Appellant, S. R. Hart and Henry Hogan. For Respondents, Attorney-General Hart and W. D. Tupper and F. H. Short.

Department Two.

THE PEOPLE, Respondents,
vs. No. 20,852.
F. O. VINCENT, Appellant.

Appellant was convicted of the crime of murder in the first degree, and appeals from the judgment and from an order denying his motion for a new trial.

1. We see no errors in the rulings of the Court below in the matter of empaneling the jury.

It appears that the regular venire of jurors having been exhausted before the jury was completed, the Court ordered a special venire to be summoned by the Sheriff; that upon the return of the Sheriff the appellant interposed a challenge to the entire panel of jurors summoned upon said special venire, upon the ground of the bias and prejudice of the Deputy Sheriff who summoned them; and that said challenge was by the Court sustained. Appellant then interposed a challenge to the regular venire of jurors upon the ground that they had not been drawn in the manner as prescribed in Section 205, Code of Civil Procedure, and the Court also sustained that challenge. The Court then ordered a second special venire to be issued for one hundred jurors, and upon the return of the Sheriff it appeared that, of the one hundred jurors summoned, several were jurors who had also been upon the first special venire to which a challenge had been sustained for bias of the officer who summoned them. Appellant then interposed a challenge to the panel (of the second special venire) upon the ground that a part of the panel was composed of persons who were upon the first special venire, and for which the challenge for bias of the officer had been sustained as aforesaid; and upon the further ground (as we understand it) that because the drawing of regular jurors for the year was invalid, therefore there could be no valid order for the summoning of special jurors by the Sheriff. As to the first point, it is clear that the fact that a few persons summoned on the second venire had also been summoned on the first, furnished no basis for a challenge *to the panel*. It is not made a ground for such challenge by the statute. Penal Code, 1064. Whatever legal objections appellant may have had to those persons should have been presented as challenges to individual jurors. As to the second point, it was held in Levy *vs.* Wilson, 69 California, 111, and other cases, that the Court under Section 226, Code of Civil Procedure, may at any time direct the Sheriff to summon jurors from the body of the county, although there be names of properly selected regular jurors in the jury-box; and when from any cause there are no regular jurors to be drawn from, the very case arises where the Court may, without any doubt whatever, exercise the power granted by said Section 226.

2. We see no abuse of discretion in the overruling of appellant's motion for a change of venue. It is true that the prosecution filed no counter affidavits, except as to the employment of assistant counsel; but the only affidavits filed by the appellant on the motion were made by himself and his counsel, which fact distinguishes the case widely from People *vs.* Yoakum, 53 Cal., 566, upon which he relies. Moreover, as to the main point of public feeling against appellant in the county in which he was tried, the affidavits are largely upon information and belief, and upon that point, as the motion was not made until several days after the trial had commenced, the Court had witnessed the examination of a large number of jurors. The Code provides that "if the Court *be satisfied* that the representations of the appellant are true" the motion should be granted; and we certainly cannot say that in this case the Court ought to have been so satisfied. It is true that the discretion of a trial Court to grant or refuse a change of venue is not an arbitrary discretion—a mere naked irresponsible power; but when there has been fair room for the play of such discretion, and its exercise has not gone beyond legitimate and reasonable limits, it cannot be rightfully interfered with by the appellate Court. (People *vs.* Elliott, 80 Cal., 296, and cases there cited.) And we see no reason to hold that in the case at bar such discretion was improperly exercised.

3. It is contended by appellant that the Court erred in instructing the jury that "evidence of drunkenness can only be considered by the jury for the purpose of determining the degree of crime, and for this purpose it must be received with great caution." This instruction and others stating the same principle have been frequently approved by this Court in murder cases. (People *vs.* Lewis, 36 Cal., 534; People *vs.* Williams. 43 *id.*, 344; People *vs.* Belencia, 21 *id.*, 544; People *vs.* King, 27 *id.*, 507; People *vs.* Ferris, 55 *id.*, 588; People *vs.* Jones, 63 *id.*, 168.) Appellant relies on the recent case of People *vs.* Phelan, III Cal. Decs., p. 51; 28 Pac. Rep., 855, in which the said instruction above quoted was held to be erroneous. But that was a case of *burglary*, in which the degrees of the crime are not based at all upon the principle which distinguishes the degrees of murder. Section 22 of the Penal Code provides that "whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any species *of degree* of crime, the jury make take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." Now, the degrees of murder are based upon the "intent" — the deliberation or premeditation — with which the act is done; and therefore it is not improper in trials for unlawful homicide to instruct the

jury that they can consider intoxication only for the purpose of determining the degree of the crime, because that is telling them in substance that they may consider it in determining "the purpose, motive, and intent" with which the act was committed. But in burglary the degrees of the crime are fixed solely by the point of *time* at which the act was done—if in the night-time, of the first degree; if in the daytime, of the second degree. Therefore, to tell a jury in a burglary case that they could consider intoxication only in determining the *degree* of the crime would be not only absurd, but to take away from them the right to consider it in determining the "purpose, motive, or intent" with which the accused did the act complained of. Burglary consists in entering a house (or one of certain other buildings mentioned in the Code), "with intent to commit grand or petit larceny, or any felony;" and it is apparent to the dullest apprehension that a drunken man might unlawfully enter a house without any intent whatever to commit larceny or felony. And it is equally apparent that a jury, in determining with what intent he entered, might well consider the fact that he was intoxicated; but the "degree" of the crime would have nothing to do with it. The Court, in delivering the decision in People *vs.* Phelan, did not consider it necessary to state that they were not dealing with a murder trial.

4. The crime of which appellant was convicted was committed prior to the Act of March 31, 1891, amending Sections 1217 and 1229 of the Penal Code, relating to the time and place for the execution of the death penalty; but it must be deemed to have been settled by the decision of this Court in bank in the case of the People *vs.* McNulty, 93 Cal., 427, that such amendments do not apply to convictions for offenses committed prior to their enactment.

The transcript does not contain the evidence, and the foregoing are the only grounds relied on for are versal. The record presents no error.

Judgment and order appealed from affirmed.

McFARLAND, J.

We concur:
De HAVEN, J.
SHARPSTEIN, J.

Order.

In the Supreme Court of the State of California. In Bank. No. 20,852.

The People, Etc., Respondent, *vs.* F. O. Vincent, Appellant. } On Appeal from the Superior Court of the County of Fresno.

Rehearing denied by the Court.

I, L. H. Brown, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of an order made and entered in the above entitled cause, on the 24th day of August, A. D. 1892, as shown by the records of my office.

Witness my hand and the seal of the Court, this 6th day of February, A. D. 1893.

L. H. BROWN,
Clerk.

[SEAL]

By GEO. A. McCALVY,
Deputy Clerk.

August 25, 1892. Remittitur issued to the County Clerk of Fresno County.

January 17, 1893. Undertaking for costs approved.

January 19, 1893. Writ of error filed.

January 19, 1893. Citations from United States Supreme Court on writ of error.

[Copy.]

UNITED STATES OF AMERICA, ss.:

To the People of the State of California—Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the Supreme Court of the State of California, wherein F. O. Vincent is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Stephen J. Field, Associate Justice of the Supreme Court of the United States this fifth day of January, in the year of our Lord one thousand eight hundred and ninety-three.

(Signed:) STEPHEN J. FIELD.
Associate Justice of the Supreme Court of the United States.

[Indorsed:] In the Supreme Court of the United States. F. O. Vincent, plaintiff in error, *vs.* The People of the State of California, defendant in error. Citation directed to the People of the State of California. Service of the within citation admitted this 18th day of January, 1893. Wm. H. H. Hart, Attorney-General of the State of California. Filed January 19, 1893, L. H. Brown, Clerk; by W. H. Govan, Deputy.

UNITED STATES OF AMERICA, ss.:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of California—Greeting:

[SEAL.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between F. O. Vincent, plaintiff in error, and the People of the State of California, defendants in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said F. O. Vincent, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the fifth day of January, in the year of our Lord one thousand eight hundred and ninety-three.

(Signed:) JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed to operate as a supersedeas.

(Signed:) STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

[Indorsed:] In the Supreme Court of the United States. F. O. Vincent, plaintiff in error, vs. The People of the State of California, defendant in error. Writ of Error directed to the Supreme Court of the State of California: Due service of the within writ of error and supersedeas and receipt of a true copy thereof is hereby admitted by the People of the State of California this 18th day of January, 1893, at Sacramento, California. Wm. H. H. Hart, Attorney-General of the State of California.

In the Supreme Court of the United States of America.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
F. O. VINCENT.
} 20,852.

Service of a certified copy of a writ of error issued out of the Supreme Court of the United States in this case and directed to the Justices of the Supreme Court of the State of California, which writ is allowed to act as a supersedeas, admitted by me this 21st day of January, A. D. 1893.

JAY SCOTT,
Sheriff of the County of Fresno, State of California.

By F. T. BERRY,
Under Sheriff.

[Indorsed:] Supreme Court of the United States. The People of the State of California *vs.* F. O. Vincent. Admission of service of copy of writ of error. Filed: January 24, 1893. L. H. Brown, Clerk, by Geo. A. McCalvy, Deputy.

Know all men by these Presents: That we, B. A. Chappel and G. W. Doughty, are firmly held and bound unto The People of the State of California in the full and just sum of five hundred dollars, to be paid to the said The People of the State of California; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seal and dated this 22d day of December, 1892.

Whereas, lately in a suit depending in the Supreme Court of the State of California, between F. O. Vincent and The People of the State of California, judgment was rendered against said F. O. Vincent, and the said F. O. Vincent being about to obtain a writ of error, and file and lodge a copy thereof, in the Clerk's office of said Supreme Court, to reverse the judgment in the aforesaid suit, and being about to issue a citation directed to The People of the State of California, citing and admonishing The People of the State of California to be and appear at the Supreme Court of the United States to be held at the City of Washington, in the District of Columbia, on the 18th day of February, A. D. 1893.

Now, the condition of the above obligation is such that if the said F. O. Vincent shall prosecute his writ of error to effect and answer all damages and costs, then the above obligation to be void, else to remain in full force and virtue.

(Signed:) B. A. CHAPPEL.
(Signed:) G. W. DOUGHTY.

STATE OF CALIFORNIA, } *ss.*
County of Napa. }

B. A. Chappel and G. W. Doughty, sureties above named, being duly sworn, each deposes and says for himself personally, that he is a householder and resident within the State of California, and that he is worth the sum of five hundred dollars over and above his debts and liabilities exclusive of property exempt from execution.

(Signed:) B. A. CHAPPEL.
(Signed:) G. A. DOUGHTY.

Subscribed and sworn to before me, this 22d day of December, A. D. 1892.

HENRY HOGAN,
Notary Public in and for the County of Napa, State of California.

The above bond, both as to the form, sufficiency of sureties, and amount, is hereby approved this 5th day of January, A. D. 1893, and of the independence of the United States the 117th.

(Signed:) STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

[Indorsed:] In the Supreme Court of the United States: F. O. Vincent, plaintiff in error, vs. The People of the State of California, defendant in error.

Undertaking for costs.

Assignment of Errors.

United States of America: Supreme Court of the United States, October term, 1892.

F. O. VINCENT, Plaintiff in Error, *vs.* THE PEOPLE OF THE STATE OF CALIFORNIA, Defendant in Error.	Assignment of Errors.

On the sixth day of March, in this same term before the Justices of the Supreme Court of the United States, at the City of Washington, comes the said F. O. Vincent, by his attorneys, and says that in the record and proceedings aforesaid, there is manifest error in this, to wit:

First—For that the Supreme Court of the State of California erred in adjudging that the execution of the judgment rendered by the Superior Court of the County of Fresno, State of California, on the 8th day of April, 1891, would not be to deprive plaintiff in error of life without due process of law.

Second—For that the said Supreme Court of the State of California erred in adjudging that the plaintiff in error might be executed under Sections 1217, 1227 and 1229 of the Penal Code of the State of California, as the same stood prior to the amendment of the 31st day of March, 1891.

Third—For that the Supreme Court of the State of California erred in adjudging that Section 329 of the Political Code kept alive the original provisions of Sections 1217, 1227 and 1229 of the Penal Code for the purpose, among other things, of executing the aforesaid judgment of the aforesaid Superior Court.

Fourth—For that the said Supreme Court of the State of California should have discharged the plaintiff in error and released him from custody because the enforcement of the aforesaid judgment would be repugnant to the provisions of the Constitution and particularly to the fourteenth amendment thereto, and to that provision of said amendment which forbids the deprival of the plaintiff in error of his life without due process of law.

And the said F. O. Vincent prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he has lost by reason of said judgment.

F. O. VINCENT,
Plaintiff in Error.

By HENRY HOGAN,
GEORGE R. B. HAYES, and
CARROLL COOK,
His Attorneys.

[Indorsed:] Filed in the Supreme Court of the State of California, February 24, 1893.

I, L. H. Brown, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing 55 printed pages, numbered from 1 to 55, inclusive, are a full, true, and correct copy of the record, and of all proceedings in the above and therein entitled action, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said Court, this 14th day of March, 1893.

L. H. Brown

[SEAL.] Clerk of the Supreme Court of the State of California.

1310

149 US 608

APR 17

JAMES H. McKENN

No. ....

SUPREME COURT OF THE UNITED STAT

OCTOBER TERM, 1892.

F. O. VINCENT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, DEFENDA
IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFOR

***Brief in Support of Motion to Dismiss, and in Support of Mo
to Affirm.***

**Wm. H. H. HART, Attorney-General of California,
Attorney for Defendant in Error.**

I, L. H. Brown, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing 55 printed pages, numbered from 1 to 55, inclusive, are a full, true, and correct copy of the record, and of all proceedings in the above and therein entitled action, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said Court, this 14th day of March, 1893.

L. H. Brown

[SEAL.] Clerk of the Supreme Court of the State of California.

1316

149 US 608

Office Supreme Court U. S.
FILED.
APR 17 1893
JAMES H. McKENNEY,
CLERK.

No. ....

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

F. O. VINCENT, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief in Support of Motion to Dismiss, and in Support of Motion to Affirm.

Wm. H. H. HART, Attorney-General of California,
Attorney for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

F. O. VINCENT, Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief in Support of Motion to Dismiss, and in Support of Motion to Affirm.

In this case the defendant in error has made a motion to affirm, united with a motion to dismiss, for want of jurisdiction.

1. The plaintiff in error was convicted of murder, and sentenced to be hanged in the county of Fresno, in accordance with the statute of California then in force, requiring that execution for a capital offense should be by the Sheriff of the county, and in the county jail (Record, pp. 25 and 26), as the law of the State then provided (Record p. 51).

Subsequently, and after this cause had been appealed to the Supreme Court of California, and before a decision in that Court, a law was passed in that State directing that executions for capital offenses should be by the Warden of the State Prison, and in the State Prison. (Record, p. 51.)

The judgment of the Supreme Court of California, affirming the judgment commanding the execution of the plaintiff in error, was made on the ground that the law which was in force at the time he was convicted and sentenced to be executed remained in force as to offenses committed thereunder, and the Court came to this conclusion, in view of the provisions of Section 329 of the Political Code of California, which the Court regarded as a saving clause. That section reads as follows:

"The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment, information, or punishment is expressly declared in the repealing Act."

The opinion of the Court affirming the judgment is printed in the record in this cause, pp. 49–51, and is reported in Volume 95 of the California Reports, p. 425.

Thus it will be seen that the decision of that Court, which the plaintiff in error seeks to have here reviewed, related entirely to the question whether a certain statute of that State had been repealed, and not to any Federal question.

In the brief for plaintiff in error, filed in the McNulty case in this Court, there are general statements, from which counsel would have it understood that in rendering the judgment the State Supreme Court decided in respect to the validity of statutes of that State under the Constitution of the United States; but the brief does not point out what particular question is thus decided, nor under what particular provision of the laws of Congress it is claimed this Court has jurisdiction in this case.

In these general statements in the brief, counsel has included an opinion of that Court which has been set aside, and the opinion dissenting therefrom by a minority of the Court, but has not specified what Federal question he claims was decided in making the decision and judgment which is now in force, and which is the only one to be considered. This decision is that which is contained in the record, pp. 111–119 in the McNulty case, to be argued with this, in which it was held, as above explained, that there existed a section in the California Statutes (said Section 329 of the Political Code), which continued statutes in force for the punishment of offenses committed under those statutes; and it appears from this opinion that there was nothing decided in relation to the constitutionality of any law, nor any Federal question whatever decided; but simply that one California statute had not been repealed by another, as to offenses committed under the former, and placing the decision upon the ground that there existed a section in the California Statutes in the nature of a saving clause in respect to offenses previously committed, being a question only for the State Court to determine, and not reviewable in this Court.

Neither would the plaintiff in error be in any better position had the first decision made by that Court been permitted to stand. That opinion is published in the record, pp. 70–91, of the McNulty case, and was to the effect that the last law, and which is termed in the brief for the plaintiff in error in that case, p. 4, the "new law," was unconstitutional, and, consequently, did not repeal the law under which the plaintiff in error had been tried, convicted, and sentenced. That decision resulted likewise in an affirmance of the judgment against McNulty.

That decision, also, had it not been set aside, was not reviewable in this Court, the law of Congress being that it is only where a State Court has decided IN FAVOR OF THE VALIDITY of a State statute, where its validity is drawn in question as being repugnant to the Constitution of the United States, that this Court has jurisdiction to review the decision. (U. S. Rev. Stats., Sec. 709). But that decision was against the validity of the new law.

There was no question made at any time in this case against the validity of the law under which McNulty committed the offense and was tried and sentenced, but the only question was whether that law had been repealed by this later law, and in the first opinion of the California Supreme Court, printed in the record, pp. 70–91, it was held that the old law had not been repealed by the new law, which was decided to be unconstitutional.

Afterwards, in that case a rehearing was granted (Record, p. 111), and again that Court held that the old law had not been repealed as to offenses committed under it, and thus held because of the saving clause in that section (329). Under both of these opinions the result was the same;

that is, that he should be executed under the old law—the law in force at the time he committed the offense charged—and in the place, mode, and manner, as it would have been if the new law had not been passed.

In the brief of the plaintiff in error, p. 8, in the McNulty case, is the following:

"In this case, our first claim on behalf of the plaintiff in error is, that having been convicted of the crime, to wit: murder in the first degree, before the present law relative to executions became a law, he cannot legally or constitutionally be executed under it."

This observation is entirely foreign to the case. As above explained, the judgment is not that the plaintiff be executed under the new law, but that he be executed according to the law in existence at the time of the commission of the offense of which he was accused and found guilty.

This case is unlike that of *ex parte Medlay*, reported in 134 U. S. 160. There Medlay was sentenced to be executed under a law which was enacted after he had committed the offense, and it was held by this honorable Court that the law under which he was thus sentenced inflicted a greater punishment than that under which the offense was committed, and was, therefore, in its nature *ex post facto* within the meaning of Section 10, Article I, of the Constitution of the United States.

In this case, the plaintiff in error has not been sentenced under a law enacted after the offense was committed, but under the same law which was then in force, the Court holding that said Section 329 continued the former law in force for the punishment of offenses committed thereunder.

Therefore, the proposition attempted to be presented to this Court by the assignment of errors (Record, p. 55 of this case), that to execute the plaintiff in error under a law passed after he committed the offense would be in violation of Section 10, Article I, of the Constitution of the United States, declaring that no State shall pass any bill of attainder or *ex post facto* law, has no application to this case, as the judgment does not direct his execution in the State Prison, or by the Warden of the State Prison, or at all in accordance with the new law, but by the Sheriff of the county, and in the county jail, under the law existing and as it existed at the time of the commission of the offense. (Record, pp. 49–51.)

Whether, under a proper construction of the statutes of California, the law in force at the time the offense was committed was wholly repealed by the subsequent law, or was continued in force as to offenses committed thereunder by that section (329) of the Political Code, is a question solely for the State Courts to determine, and not a question of which this Court has jurisdiction.

As the Supreme Court of California decided that the plaintiff in error should be executed in the manner prescribed by the law in existence when he committed the offense (Record, p. 51), it is not material to inquire whether the subsequent law increased the punishment for a capital offense.

The State Court, by its judgment, has not attempted to enforce against the plaintiff in error an *ex post facto* law, and there cannot, therefore, be any question in this case concerning a law of that nature.

2. Neither would the execution of the plaintiff in error, in obedience to the judgment of the State Court, be depriving him of life without due process of law.

In the opinion in *Hurtado* vs. *California*, 110 U. S. 516, there is a very full exposition of the meaning of the words "due process of law."

The following is from page 527 of that opinion:

"Mr. Reeve, in 2 History of Eng. Law, 43, translates the phrase *nisi per legale judicium parium suorum vel per legem terræ:* 'But by the judgment of his peers, or by some other legal process or proceeding adapted by the law to the nature of the case.'

"Chancellor Kent, 2 Com. 13, adopts this mode of construing the phrase. Quoting the language of Magna Charta, and referring to Lord Coke's comment upon it, he says: 'The better and larger definition of due process of law is that it means law in its regular course of administration through Courts of justice.'

"This accords with what is said in *Westervelt* vs. *Gregg*, 12 N. Y. 202, by Denio, J., p. 212: 'The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government.'"

On page 534 of that opinion is given an extract from the opinion by Justice Miller, in *Davidson* vs. *New Orleans*, 96 U. S. 105, reading as follows:

"It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has by the laws of the State a fair trial in a Court of justice, according to the modes of proceeding applicable to such a case."

The following is from pages 535, 536 of 110 U. S.:

"Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation."

Tested by these definitions of what is due process of law, the execution of the plaintiff in error would be by such process.

He has been convicted and sentenced in the regular course of administration of law in Courts of justice, after a trial according to the usual mode of proceeding applicable to such a case.

In the assignment of errors or stipulation it is asserted (page 48 of the record) that the statutes under which the plaintiff in error was accused, tried, convicted, and sentenced to be hanged, were absolutely and completely repealed without any saving clause.

The Supreme Court of California decided otherwise (Record, p. 51), and there is no complaint that the plaintiff in error did not have an opportunity to have his case duly presented to that Court, and the enforcement of the judgment thus given would be due process of law.

The plaintiff in error cannot, in this Court, controvert the correctness of the judgment of the Supreme Court of California as to the construction given by that Court to the California statutes in holding that the statute under which he was prosecuted, convicted, and sentenced has not been repealed as to offenses committed under it, such decision not being upon a Federal question.

The question whether a statute of a State has been repealed by a subsequent statute, is purely a question for the cognizance of the State Court, and not a question of which this Court has jurisdiction.

The following is from the opinion in *Blount* vs. *Walker*, 134 U. S. 614:

"To give this Court jurisdiction of a writ of error to a State Court, it must appear affirmatively, not only that a Federal question was presented for decision to the highest Court of the State having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it. (*New Orleans Waterworks Company* vs. *Louisiana Sugar Refining Company*, 125 U. S. 18, 29; *Klinger* vs. *Missouri*, 13 Wall. 227, 263; *Desaussure* vs. *Gaillard*, 127 U. S. 216; *Hopkins* vs. *McLure*, 133 U. S. 380.)"

3. Assignment of errors of record are as follows:

First—For that the Supreme Court of the State of California erred in adjudging that the execution of the judgment rendered by the Superior Court of the county of Fresno, State of California, on the eighth day of April, 1891, would not be to deprive plaintiff in error of life without due process of law.

Second—For that said Supreme Court of the State of California erred in adjudging that the plaintiff in error might be executed under Sections 1217, 1227, and 1229 of the Penal Code of the State of California, as the same stood prior to the amendment of the thirty-first day of March, 1891.

Third—For that the Supreme Court of the State of California erred in adjudging that Section 329 of the Political Code kept alive the original provisions of Sections 1217, 1227, and 1229 of the Penal Code, for the purpose, among other things, of executing the aforesaid judgment of the aforesaid Superior Court.

Fourth—For that the said Supreme Court of the State of California should have discharged the plaintiff in error and released him from custody, because the enforcement of the aforesaid judgment would be repugnant to the provisions of the Constitution, and particularly to the Fourteenth Amendment thereto, and to that provision of said amendment which forbids the deprival of the plaintiff in error of his life without due process of law.

There is no merit in any of these, for the following reasons:

First—No such point was made or decided in the State Court, and if made was not involved in that Court or the case on the record therein made.

Second—The first, second, and third assignments of error raise no Federal question or point other than State practice.

Third—None of the points made in the stipulation of points involved (Record, p 48) raises a Federal question.

To be reviewable in this Court, the right, privilege, or immunity must have been set up or claimed at the proper time in the proper way in the

State Supreme Court, and the decision must be against the right so set up or claimed.

Spies vs. *Illinois*, 123 U. S. 181.

Fourth—It does not appear from the record that there was not a legal examination and commitment or proper trial.

Under the Penal Code of California, to raise the question in the Supreme Court that there had not been an examination and commitment preliminary to the filing of an information, it would be necessary to present the question by motion in the trial Court, and, on the denial of the motion, to incorporate the same, accompanied by a statement that there had not been an examination and commitment, in a bill of exceptions, so as to have the same appear in the record, otherwise it would not appear in the record before the Supreme Court whether there had or had not been an examination and commitment, as the papers showing the examination and commitment do not, under the statutes of California, constitute any part of the usual record. The following is from the Penal Code:

"Sec. 1207. When judgment upon a conviction is rendered, the Clerk must enter the same in the minutes, stating briefly the offense for which the conviction was had, and the fact of a prior conviction, if one, and must, within five days, annex together and file the following papers, which will constitute a record of the action:

"1. The indictment or information, and a copy of the minutes of the plea or demurrer;

"2. A copy of the minutes of the trial;

"3. The charges given or refused, and the indorsement thereon; and,

"4. A copy of the judgment."

Section 1246 of the Penal Code directs what shall be transmitted to the Supreme Court of the State on appeal in a criminal case, as follows:

"Sec. 1246. Upon an appeal being taken, the Clerk with whom the notice of appeal is filed, must, within ten days thereafter, in case the bill of exceptions has been settled by the Judge before the giving of said notice, but if not, then within ten days from the settlement of the bill of exceptions, without charge, transmit to the Clerk of the appellate Court a copy of the notice of appeal, and of the record, and of all bills of exceptions, instructions, and indorsements thereon; and, upon the receipt thereof, the Clerk of the appellate Court must file the same and perform the same services as in civil cases, without charge."

In the record in this case, no bill of exceptions appears to show that the plaintiff in error was not examined and committed, or that any point was made in the State Court in that regard.

It is decided in *Hurtado* vs. *People of California*, 110 U. S. 516, that the words "due process of law," in the Fourteenth Amendment of the Constitution of the United States, do not necessarily require an indictment by grand jury in a prosecution by a State for murder.

It is respectfully submitted that the motion to dismiss the writ of error should be sustained.

If, however, a Federal question was or is involved, and if this Court on the record has jurisdiction, then I submit the judgment of the State Court should be affirmed, because the writ of error was taken for delay and not because of sufficient grounds.

Wm. H. H. HART,
Attorney-General of the State of California,
Attorney for the Defendant in Error.

State Supreme Court, and the decision must be against the right so set up or claimed.

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If, however, a Federal question was or is involved, and if this Court on the record has jurisdiction, then I submit the judgment of the State Court should be affirmed, because the writ of error was taken for delay and not because of sufficient grounds.

Wm. H. H. HART,
Attorney-General of the State of California,
Attorney for the Defendant in Error.

1189 – 649

Office Supreme Court U.S.
FILED.
APR 28 1893
JAMES H. McKENNEY,
CLERK.

APPELLEES' BRIEF

ON MOTION TO DISMISS.

CASE NO. 15,157.

Supreme Court of the United States,

OCTOBER TERM, 1892.

TERM NO. 1187.

GEORGE E. SHUTE, Sheriff, and ADOLF LADENBURG, ERNST THALMANN, and
ABRAHAM LIMBURGER,

co-partners, under the firm name of

LADENBURG, THALMANN & CO.,
APPELLANTS,
vs.
WILLIAM KEYSER.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA

CASE No. 15,157.

GEORGE E. SHUTE, Sheriff,
and
ADOLF LADENBURG,
ERNST THALMANN,
and
ABRAHAM LIMBURGER,
co-partners,
under the firm name of
LADENBURG, THALMANN & CO.
APPELLANTS,
vs.
WILLIAM KEYSER.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM No. 1187.

APPELLEES' BRIEF,

ON MOTION TO DISMISS.

STATEMENT OF FACTS.

This is an appeal from the final judgment and decree of the Supreme Court of the Territory of Arizona, entered on the 16th *day of January*, 1892, in which the judgment of the District Court of the Second Judicial District of Arizona, in and for Gila County, overruling the Defendants' (Appellants') demurrer and making perpetual the injunction against the appellants, was affirmed.

The appeal to this Court was taken on *February* 13th, 1892.

Record, pages 74–75.

The citation was attested on the 12th day of March, 1892, and cited the appellee to appear, at the Supreme Court of the United States, on the second Monday of October, 1892.

Record, pages 76–77.

The complaint of the appellee, plaintiff below, alleged that the Old Dominion Copper Mining Company was, on and prior to February 23d, 1884, the owner of certain mining property, in Gila county; that said company, on the 23 ~~26th~~ day of Feb ~~January~~, 1884, confessed judgment in favor of George Pope and others, among whom was the appellee, for $277,378.27; that on January 26th, 1886, under an execution on said judgment, said mining property was sold to William Keyser, the appellee, who received a deed from the sheriff for the same.

That on *November* 30th, 1887, three judgments were rendered in the District Court, First Judicial District of Arizona, in and for Cochise County, in favor of the appellants, Landenburg, Thalman & Co., against the Old Dominion Copper Mining Company, and that executions had issued on said judgments, and were placed in the hands of the appellant, George E. Shute, sheriff of Gila County, and the sheriff not regarding the rights of the plaintiff, William Keyser, had levied on and was about to sell the said mining property, previously purchased by said Keyser, under the sheriff's sale, as aforesaid.

The prayer for relief was: 1st. For an injunction restraining the defendants from selling said mining property. 2d. That upon final hearing, said injunction be made perpetual, and for further relief.

Record, page 1.

To this complaint, the defendants,

1. Demurred,
2. Denied all allegations.
3. Answered, that on February 23, 1884, the date of the confession of judgment in favor of George Pope and others by the Old Dominion Copper Company, the defendants, had previously entered suit in three different causes of action, in Cochise County, against said Copper Company, in which suits writs of attachments were issued to the sheriff of Gila County, who duly served the same and levied on the said mining property. That judgments were subsequently obtained in Cochise County, on said suits and execution

issued to Gila County, which executions were the same the plaintiff was seeking to enjoin, and further claimed that by reason of the levy made under the writs of attachment on February 23d, 1884, the defendants acquired a prior lien on the property in question.

Record, page 6.

Both parties produced evidence tending to show that their respective liens had priority the one over the other in having been recorded at the earlier period of time.

The District Court having overruled the demurrer of the defendants, and made perpetual the injunction, an appeal was had to the Supreme Court of the Territory, which court affirmed the judgment of the District Court.

The points raised by the appellants in the Supreme Court of the Territory will be found in Record, page 73, and the opinion of the Court, Record, page 81.

POINTS OF LAW.

1

The appeal is erroneously brought to this Honorable Court, and the court has no jurisdiction to entertain it. The final judgment and decree of the Supreme Court of the Territory was rendered on *January* 16th, 1892, and the appeal taken to this court *February* 13th, 1892, both dates being subsequent to the Act of March 3d, 1891, chap. 517, creating the Circuit Court of Appeals.

Prior to this last statute, writs of error and appeals were allowed from the final judgments and decrees of the Supreme Court of Arizona and other territories to the Supreme Court of the United States, "in the same manner and under the same regulations as from the circuit courts of the United States," where the value of property exceeded $1,000.

Rev. Statutes of U. S. Sect. 702.
" " " " " 1909.

Which value of property was increased to $5,000, by Act of March 3d, 1885.

Supplement to Rev. St. of U. S., p. 485.

Such being the law at the time of the passage of the Act of March 3d, 1891, it is necessary to consider what effect the passage of that act had upon the appellate jurisdiction of the court, in cases from the supreme courts of the territories. One of three propositions, it would seem, must be true.

1. That the Supreme Court of the United States will continue to exercise an appellate jurisdiction from the territories, "in the same manner and under the same regulations," as it exercised on appellate jurisdiction prior to the Act of March 3d, 1891, from the Circuit Courts of the United States, notwithstanding that the latter jurisdiction has been taken away and redistributed by the Act of March 3d, 1891.

2. That the supreme court will exercise an appellate jurisdiction from the territories "in the same manner and under the same regulations," as it *now* exercises an appellate jurisdiction, under the Act of March 3d, 1891, from the Circuit Courts of the United States.

3. That the Act of March 3d, 1891, provides for the redistribution of the entire appellate jurisdiction of the national judicial system, and that any appellate jurisdiction of the Supreme Court, ~~from~~ over the decisions of the territorial courts, must be found in that act.

As to the first proposition, that notwithstanding the system of appeals from the Circuit Courts has been abolished by the Act of March 3d, 1891, the court will still look to that system for its jurisdiction to hear appeals from the supreme courts of the territories. It can hardly be presumed that Congress could have contemplated, when redistributing the appellate jurisdiction of the national judicial system, such a cumbersome mode of procedure. That having repealed the whole system of appeals from the circuit courts, it should have intended to keep that system alive in so far as to allow appeals from the territorial courts. And that this court should thus exercise a live and present appellate jurisdiction based upon a dead and repealed system.

The repeal of a statute carries with it a supplemental statute so dependant upon the former, that it cannot be enforced without such original act.

Ellison vs. Jackson, 12 Cal. 542.

Nor can such a proposition be maintained, in view of the provisions of the Act of March 3d, 1891. Sects. 14 and 15.

Section 14 provides that "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceeding sections 5 and 6 of this act are hereby repealed."

While section 15 provides "that the Circuit Court of Appeals in cases in which the judgments of the Circuit Court of Appeals are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal to review the judgments, orders and decrees of the supreme courts of the several territories as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts."

Thus showing the intention of repealing all acts and parts of acts, relating to appeals or writs of error, inconsistent with the provisions of this act and at the same time specifying in what manner appeals might be had from the territories. It would therefore seem untenable to maintain that while the act of March 3d, 1891, repealed the former system of appeals from the district and circuit courts, that because it did not *expressly* repeal the dependent statute, allowing appeals from the territorial courts in the same manner, etc. as appeals from the circuit courts, that appeals can still be had, as heretofore, from the territorial courts, and this notwithstanding that section 15 expressly defines the classes of cases in which, under the new act appeals may be taken from the supreme courts of the territories.

Jurisdiction may be taken away by the repeal of the statute confering it, by implication as well as by express words.

Sutherland on Statutory Construction, p. 222.
New London R. R. Co. vs. Boston & Albany R. R. Co. 102 Mass. 386.
Crisp vs. Bunbury. 8 Bing. 394.

Even if the second proposition can be maintained that the Supreme Court will exercise an appellate jurisdiction from the territories "in the same manner and under the same regulations" as it now exercises an appellate jurisdiction, under the Act of March 3d, 1891, from the Circuit Courts of the United States, this motion to dismiss must prevail, as this case does not come within the classification of cases which, by the act may be appealed directly to the Supreme Court from the circuit courts.

By section 5 it is provided that appeals may be had directly to the Supreme Court, from the district and circuit courts.

1. "In any case in which the jurisdiction of the court is in issue, in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

2. "From final sentences and decrees in prize cases."

3. "In cases of conviction of a capital or other infamous crime."

4. "In any case that involves the construction or application of the Constitution of the United Statet."

5. "In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question."

6. "In any case in which the constitution or law of a state is claimed to be in conflict of the constitution of the United States."

The case at bar does not come within any of the above classes, but is a civil proceeding, asking the court to enjoin the defendents below from selling the property of the appellee~~s~~, under an execution, on a judgment.

As to the 3d proposition, viz :

That the Act of March 2d, 1891, provides for the re-distribution of the entire appellate jurisdiction of the national judicial system, and that any appellate jurisdiction of the Supreme Court, ~~from~~ over the decisions of the territorial courts, must be found in that Act.

As is said in McLish *vs.* Roff, 141 U. S., 666, and quoted with approbation in

Lou o. w. Bew *vs.* United States, 144 U. S., 56.

"It (the Act of March 3d, 1891, Chap. 517) then provides for the distribution of the entire appellate jurisdiction of our national judicial system, between the Supreme Court of the United States and the Circuit Court of Appeals, therein established."

The Act itself gives ample evidence that the intention was not merely to regulate appeals from the District and Circuit Courts, but also those from the Supreme Court of the territories, and from those of the states, and that in fact, it does, in the words of the court, "provide for the distribution of the entire appellate jurisdiction of our national judicial system."

By section 5, it is provided that nothing in this Act shall effect the jurisdiction of the Supreme Court, in cases appealed from the highest court of a state, &c.

And by section 13, "Appeals and writs of error may be taken and prosecuted from the Indian Territory to the Supreme Court of the United States, or to the Circuit Court of Appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this Act."

Thus recognizing the necessity of preserving from the effect of the repealing clause of this statute, the right of appeal from the states and the Indian Territory. If the Act had the effect of repealing the statute, allowing appeals from the Indian Territory, it must have had the same effect upon the statute allowing appeals from Arizona and the other territories as both statutes are substantially the same. Appeals were allowed from the Indian Territory by Act of May 2d, 1890, chap. 182, section 9, Supplement to Revised Statutes, page 738, and from Arizona, and other territories, by Revised Statutes of U. S., section 1909.

Having thus established an appellate jurisdiction from the Indian Territory, the Act proceeds to establish and provide for appeals and writs of error from the decisions of the Supreme Courts of all the other territories.

Section 15 Provides "That the Circuit Courts of Appeals in cases in which the judgments of the Circuit Courts of Appeals are made final by this Act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders and decrees of the Supreme Courts of the several territories as by this Act they may have to review the judgments, orders and decrees of the district courts and circuit courts, and for that purpose the several territories, shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits.

Under this last provision, Arizona has been assigned to the 9th circuit.

If then the right to appeal from the Supreme Courts, of the territories, must be sought for in this Act, it would appear that no appeal can be had directly to the Supreme Court, but that appeals are allowed in certain specified cases to the Circuit Court of Appeals.

Nor can it be argued that because this Act restricts the right of appeal, to the Circuit Court of Appeals, and to but a limited class of cases, that the right of appeal is still to be enjoyed, in all other cases, directly to the Supreme Court in as ample a manner as prior to the Act.

All appellate jurisdiction from the territories must be exercised in the manner prescribed by the general laws of Congress.

Hunt *vs.* Palao, 4 How., 589.

And the mere fact that Congress may at any time see fit to restrict to more narrow limits the right of appeal, can not be complained of.

The Court says, in Holmes *vs.* Goldsmith :

"It must be admitted that, if the constitution had ordained and established the inferior courts and distributed to them their respective powers, they could not be restricted or divested by Congress, but as it has made no such distribution, one or two consequences must result, either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions."

"The first of these inferences has never been asserted and could not be defended with any show of reason, and, if not, the latter would seem to follow as a necessary consequence. And it would seem to follow also, that having a right to prescribe, Congress may withhold from any court, of its creation, jurisdiction of any enumerated controversies."

"Courts created by statute can have no jurisdiction but such as the statute confers, no one can assert a just claim to jurisdiction exclusive conferred on another or withheld from all."

Holmes *vs.* Goldsmith, 147 U.S., pt. 1, p. 158.

To maintain any other conclusion, than, that the Act of March 3d, 1891, swept away and repealed the appellate jurisdiction then exercised by the Supreme Court from the territories, would be to establish a most extraordinary anomaly, namely, that while the act provides by sections 15 and 6, that appeals and writs of error may be had from the territories to the Circuit Court of Appeals, in cases where the jurisdiction is dependent entirely upon the opposite parties to the suit being aliens and citizens of the United States, or citizens of different states; cases arising under the patent laws, revenue laws, criminal laws and in admiralty; all of which classes embrace more or less questions of a federal character, that the minor questions of a local character, as the right of property, as in the case at bar, are to be taken directly to the Supreme Court, from the supreme courts of the territories. If such be the case, there is no reason why the question of the ownership of a horse, if of the value of $5,000, litigated between two citizens of a territory should not be finally heard and decided by the Supreme Court of the United States.

If the Act of March 3d, 1891, did repeal the former system of appeals from the territor~~y~~ies, it set up either the system just discussed under the third proposition, and made all judgments of the supreme courts of the territories final, except in those cases specified in sections 15 and 6, which are appealable to the Circuit Court of Appeals, In which case this motion must prevail.

Or it set up a system of appeals under the second proposition, namely, that appeals will be allowed from the territorial courts, as provided in sections 15 and 6, to the Circuit Court of Appeals, and to the Supreme Court of the United States, as appeals are allowed by section 5 of the Act, from the circuit courts. Under this view, appeals would be allowed directly to the Supreme Court of the United States, in cases involving the jurisdiction of the territorial courts; final decisions, in prize cases, capital and other infamous crimes, and constitutional questions, and questions affecting treaties.

While the circuit court of appeals would have appellate jurisdiction from the final judgments of the territorial courts, as it has appellate jurisdiction from the circuit courts, and in all other cases, such as are of a domestic and local character, as the case at bar, the judgments of the supreme courts of the territories would, in analogy to the judgments of the supreme courts of the states, be final; and thus the whole jurisdiction would appear to be distributed. In this view of the statute this motion must prevail, as the case at bar does not come under the classes enumerated in section 5, which are appealable directly to the Supreme Court, or under those in section 6, which are appealable to the Circuit Court of Appeals, but should have abided the final judgment of the Supreme Court of the territory.

2.

THE CITATION.

By rule 8 of the court, section 5, all appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day; and by rule 9, section 4, it is provided that, in all cases where the period of thirty days is mentioned in rule 8, it shall be extended to sixty days in writs of error and appeals from California, Arizona, &c.

The appeal in this case was taken on February 13th, 1892,

Record, pp. 74, 75.

and the citation was attested on the 12th day of March, 1892, and cited the appellee to appear at the Supreme Court of the United States, on the second Monday of October, 1892.

Record, pp. 76, 77.

R. F. BRENT,

for Appellee.

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APPELLANTS' BRIEF

TO OPPOSE MOTION TO DISMISS.

CASE No. 15,157.

Supreme Court of the United States.

OCTOBER TERM, 1892.

TERM No. 1187.

GEORGE E. SHUTE, Sheriff and ADOLF LADENBURG,
ERNST THALMANN and ABRAHAM LIMBURGER
copartners under the firm name of
LADENBURG, THALMANN & CO.,
APPELLANTS.
vs.
WILLIAM KEYSER.

APPEAL EROM THE SUPREME COURT OF
THE TERRITORY OF ARIZONA,

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GEORGE E. SHUTE, Sheriff, and ADOLF LADENBURG, ERNST THALMANN, and ABRAHAM LIMBURGER, co-partners, under the firm name of LADENBURG, THALMANN & Co., APPELLANTS, *vs.* WILLIAM KEYSER.	IN THE SUPREME COURT OF THE UNITED STATES. OCTOBER TERM, 1892. TERM NO. 1187.

APPELLANTS' BRIEF,

TO OPPOSE MOTION TO DISMISS.

POINTS.

First Point. Section 15 of Chap. 517 of the Laws of the Fifty-first Congress, Session 2, being the act of March 3d, 1891, entitled, "An Act to establish Circuit "Courts of Appeal, and to define and regulate in certain "cases the jurisdiction of the courts of the United States, "and for other purposes," provides that the Circuit

Court of Appeals, in cases in which the judgments of the Circuit Court of Appeal are made final by that act, shall have the same appellate jurisdiction by writ of error or appeal to review the judgments, orders and decrees of the Supreme Courts of the several Territories as by that act they may have to review the judgments, orders and decrees of the District Court and Circuit Courts.

The appellate jurisdiction of the Circuit Court of Appeals to review judgments of Territorial Supreme Courts is thus confined to cases where the judgment of the Circuit Court of Appeals is "*made final by this act.*"

The only causes "*made final by this act*" are those mentioned in Section 6 of such act, which declares that judgments and decrees of the Circuit Court of Appeals shall be final in the following cases, to wit:

1. In all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different States.

2. Patent cases.

3. Cases under revenue laws.

4. Criminal cases.

5. Admiralty cases.

It is apparent from inspection that the cause of action in the suit at bar falls under none of these heads. The jurisdiction of the Territorial Court was an original one, and did not depend upon diverse citizenship.

Of course it may be said that any judgment of the District Court of the Territory, or Supreme Court, or even a Justice's Court, is final as to the Court in which it is rendered, whether an appeal lies or not. Indeed it is only from final judgments (except a few specified interlocutory judgments) that any appeal ever lies to any higher court; and, in one sense, every judgment of the Circuit Court of Appeals determining the right of parties is a final judgment, but it would not be "*made final by this act.*" The words "final by this act" are certainly used in the same sense in which the word "final" is used in Section 6 of the act. No other judgments can be said to be made final by the act, for the mention of the five cases in Section 6, in which the judgment of the Circuit Court of Appeals is stated to be final, is necessarily exclusive of any other cases.

Second Point. Section 6 of the act expressly provides as follows:

"*In all cases not hereinbefore in this section made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed $1,000, besides costs.*"

Even if there was not this express provision, just quoted, permitting an appeal of this character direct to the United States Supreme Court, it would seem to be enough to say that Section 702 of the United States Revised Statutes, permitting writs of error and appeals from Supreme Courts of Territories to the United States Supreme Court, is not repealed by the Circuit Court of Appeals act.

Section 691 of the Revised Statutes is repealed; and also all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding Sections 5 and 6 of the act, are declared repealed in Section 14, but there being express provision, as quoted above, at the foot of Section 6, for appeals in all cases not by said Section 6 made final, by writ of error or appeal to the Supreme Court of the United States, Section 702 of the

U. S. Revised Statutes is necessarily reserved in force. In other words, Section 702 is not inconsistent with the provisions, for review by the Supreme Court of the United States as provided at the foot of Section 6 (quoted *supra*), and is, consequently, not repealed. The express provision, however, in Section 6, permitting these appeals, is absolute as to the appellants' right to take this appeal.

Section 702 in no event is repealed by the Circuit Court of Appeals Act. It is only acts relating to appeals from Circuit Courts of the United States inconsistent with the provisions of the Circuit Court of Appeals Act that are repealed, and not acts regulating appeals from Supreme Courts of Territories to the United States Supreme Court not provided for by Section 6.

Third Point. It is the manifest intention of the Circuit Court of Appeals Act to preserve appeals from Territorial Supreme Courts to the Supreme Court of the United States in all cases not made final by Section 6 of the act. This is clear, because :

1st. There is no provision restricting or limiting appeals in such other cases to the Circuit Court of Appeals.

2d. There is no provision for appeals in such other cases to the Circuit Court of Appeals.

3d. There is no repeal of the provisions of the U. S. Revised Statutes regulating appeals in such other cases from Supreme Courts of Territories to the U. S. Supreme Court, and

4th. Such right of appeal is expressly preserved and declared at the foot of such Section 6.

Fourth Point. Another reason might be stated why Congress gave appeals from the Supreme Court of the Territories to the Circuit Court of Appeals only in the cases specified in Section 6 of such act, and that is that the right of appeal from Circuit Courts of the United States to the U. S. Supreme Court given by Section 691 of the United States Revised Statutes being taken away by Section 14 of the act, there is merely in such Circuit Court cases :

1st. The *nisi prius* trial in the U. S. Circuit Court.

2d. Appeal to the Circuit Court of Appeals.

3d. An appeal from there to the U. S. Supreme Court. But in the Territory there is :

1. The *nisi prius* trial in the Territorial District Court.
2. The appeal to the Territorial Supreme Court, and
3. The appeal to the U. S. Supreme Court.

If an appeal were given to the Circuit Court of Appeals in Territorial cases, there would be four trials in a case coming from a Territory, while there would be only three in a case arising in the United States Courts in a State. It is reasonable to suppose that this was in view by Congress.

Fifth Point. The case of *McLish vs. Roff, 141 U. S., 666,* is not in point. It was a decision rendered under Section 13 of the Code of the Circuit Court of Appeals in which the decisions of the U. S. Court in the Indian Territory are especially provided for, and in nowise affects the provisions made for the other Territorial Courts as laid down in Section 15 and at the foot of Section 6.

The case of *Law Ow Bew vs. United States, 144 U. S., 56,* is also not in point, for the reason that that was a case coming from the Circuit Court of a State, except that the quotation from *McLish vs. Roff* on appellee's brief on this motion would seem to be in accord with the foregoing view expressed in this brief as to appeals to the Supreme Court of the United States being preserved as a matter of right in all cases not made final by the first part of Section 6 of the act.

In the case 144 U. S., *supra*, it was expressly provided that the words "unless otherwise provided by law," in Section 6, in the clause which provides that the Circuit Courts shall exercise appellate jurisdiction in all cases other than those provided for in the preceding section of the act, unless otherwise provided by law, were inserted in order to guard against implied appeals, and are not to be construed as referring to prior laws only.

Sixth Point. As to the issue and return of the citation, that is not a jurisdictional question with the Supreme Court of the United States, but is a question of procedure only, and a general appearance supplies any defect of a citation on appeal.

United States vs. Armejo, 18 L. Ed., U. S. Supreme Court R., 247.

If an appeal is allowed and docketed in the Supreme Court, the jurisdiction of the appeal becomes perfect, and what remains to get in the parties is a matter of procedure only, and not jurisdictional, so far as the appeal is concerned.

Dodge vs. Knowles, 114 U. S., 433.

In *Railroad Company vs. Blair, 100 U. S., 662,* it was said: "Still, an appeal otherwise regular would "not probably be dismissed absolutely for want of "a citation, if it appeared by clear and unmistakable "evidence outside of the record that the allowance was

" made in open court at the proper term, and that the
" appellee had actual notice of what had been done."

And the Court goes on to say in the 114 U. S.:

" The citation is intended, as notice to the appellee, that an appeal has been taken and will be duly prosecuted. No special form is prescribed. The purpose is notice so that the appellee may appear and be heard. * * * It is not jurisdictional. Its only purpose is notice."

In this cause the appellees had due notice and proof of service of the citation as duly appears in the record, and the appellees have appeared in this Court, and this criticism is of no avail.

It is allowable to issue a new citation where there is any defect in the issue or service of a citation returned to the Court with the transcript,

National Bank vs. Bank of Commerce, 99 U. S., 608.

and, if the Court deems it necessary, leave is now respectfully asked for an appeal allowing the appellants to amend the writ and citation by making the proper recital as to the return in lieu of the " second Monday in October," and causing a new citation to be issued and served on the appellees, if so deemed necessary, as was done in the 99 U. S. *(supra).*

Seventh Point. For the reasons above stated the motion to dismiss should be denied.

Respectfully submitted,
WM. ALLEN BUTLER,
JOHN NOTMAN,
Of Counsel for Appellants.

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JAMES H. McKENNEY,
CLERK.

MOTION TO DISMISS
THE APPEAL.

CASE NO. 15,157.

Supreme Court of the United States,

OCTOBER TERM, 1892.

TERM NO. 1187.

GEORGE E. SHUTE, Sheriff, and ADOLF LADENBURG, ERNST THALMANN, and
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APPEAL FROM THE SUPREME COURT OF
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In the Supreme Court of the United States.

OCTOBER TERM,
1892.

TERM NO. 1187.

MOTION TO DISMISS.

William Keyser, the appellee in the above entitled case, moves the Court to dismiss the appeal therein.

1st. For the want of jurisdiction in this Court to hear and determine the same.

2d. Because the citation was not made returnable in sixty days from the signing of the same.

This is an appeal from the final judgment and decree of the Supreme Court of Arizona, entered on the 16th *day of January*, 1892, in which the judgment of the District Court in and for Gila County, overruling the demurrer of the defendants to the complaint of the appellee, and making perpetual the injunction restraining the defendants (appellants), from selling the appellees property, was affirmed.

The citation was attested on the 12th day of March, 1892, and cited the appellee to appear at the Supreme Court of the United States, on the second Monday of October, 1892.

Record, pp. 76, 77.